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Supreme Court, U.S.
FILED
JUN 16 1982
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GREYHOUND LINES, INC.,

Petitioner,

v.

TRAILWAYS, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RICHARD S. ORDER

Questions Presented for Review

1. Was the reversal by the District of Columbia Circuit of the award by the Interstate Commerce Commission of a certificate of public convenience and necessity to petitioner which conflicted (a) with a Fifth Circuit affirmance of such an award in a companion case involving the same parties and the same issues, (b) with a Third Circuit upholding of an award of much more significant authority involving the same principal protestant and, in more elaborate form, many of the same issues, (c) with a Seventh Circuit approval of the ICC's adoption of the entry policy applied in this instance and (d) with its own prior decision requiring the ICC to refrain from singling out petitioner for uniquely discriminatory treatment, erroneous or in excess of its authority?

2. Did the District of Columbia Circuit's reversal of an Interstate Commerce Commission order granting petitioner, Greyhound, "small" authority to pick up and discharge passengers at its rest stop in Little Rock, Arkansas because of the ICC's failure to make "an in-depth study of the competitive structure of the intercity bus market" sought on the strength of mere allegations of respondents, Trailways, Inc. or to use "broad legislative-type evidence" in an adjudicatory proceeding, constitute unwarranted judicial intrusion into administrative agency policy-making and discretion?

3. Was the District of Columbia Circuit, on review of an Interstate Commerce Commission order granting a certificate of authority, justified in finding that the ICC had "evaded" a full consideration of the "broad question of the long-term effects of incremental increases of [petitioner's] market share" (a) in the absence of proof either of such evasion or of such effects and (b) in the face of (i) another ICC order specifically deciding such consideration was inappropriate in this instance, (ii) a record showing that on the evidence properly before it the ICC's denominations were supported by substantial evi-

dence, and (iii) facts of which judicial notice can be taken showing the finding to be in error?

4. Did the District of Columbia Circuit go beyond the limits of judicial review in disallowing the application by the Interstate Commerce Commission of its well-settled and judicially approved burden of proof on protestants and its rules and procedures regarding official notice and timeliness for the submission of evidence in route application cases?

LIST OF PARTIES

All parties to the proceeding in the court whose judgment is sought to be reviewed are:

Trailways, Inc., American Buslines, Inc., Arkansas Motor Coaches, Ltd., Inc., Continental Bus System, Inc., Continental Panhandle Lines, Inc., Continental Southeastern Lines, Inc., Continental Southern Lines, Inc., Continental Tennessee Lines, Inc., Denver Colorado Springs Pueblo Motorway, Inc., Edwards Motor Transit Company, Midwest Buslines, Inc., Safeway Trails, Inc., Service Coach Lines, Inc., Tamiami Trail Tours, Inc., Trailways of New England, Inc., Union Bus Lines, Inc., and Virginia Stage Lines, Inc.,

Petitioners,

v.

Interstate Commerce Commission and United States of America,

Respondents,

Greyhound Lines, Inc., National Trailways Bus Systems,

Intervenors.

LISTING PURSUANT TO RULE 28.1

THE GREYHOUND CORPORATION
(Arizona)
Active Subsidiaries and Affiliates as of December 31, 1981

Parent-subsidiary or affiliate relationships are shown by marginal indentation. State, province or country of incorporation and ownership percentage are shown in parentheses following name, except that no ownership percentage appears for 100% owned subsidiaries. If ownership is divided between two affiliates, the ownership percentage of both is combined and is not in parentheses, and in such cases the company is listed as a subsidiary or affiliate of the company holding the highest percentage of stock. List does not include companies in which the aggregate direct and indirect interest of The Greyhound Corporation is less than 20%.

TRANSPORTATION AND BUS MANUFACTURING GROUPS

AMERICAN SIGHTSEEING TOURS, INC. (Florida)
Carey Transportation, Inc. (New York)
Gray Line New York Tours Corp. (New York)
GREYHOUND LINES, INC. (California)
- Atlantic Greyhound Lines of Virginia, Inc. (Virginia)
- California Parlor Car Tours Company (California)
- Greyhound Bus Depot of Atlanta, Inc. (Georgia) (87%)
- Greyhound de Mexico, S.A. de C.V. (Mexico)
- GREYHOUND LINES OF CANADA LTD. (Canada) (61%)
  - Brewster Transport Company Limited (Alberta)
    - Columbia Icefield Snowmobile Tours Ltd. (Alberta)
  - Coachways System Ltd. (Alberta)
    - Alaskan Coachways Limited (Alaska)
    - Canadian Coachways (Alberta) Limited (Alberta)
  - Eastern Canadian Greyhound Lines, Limited (Ontario)

MOTOR COACH INDUSTRIES LIMITED (Manitoba)*
Frank Fair Industries Ltd. (Manitoba)*
Greyhound-Taseco Saudi Arabia Ltd. (Saudi Arabia) (40%)
Greyhound World Tours, Inc. (Arizona)
Greyhound World Travel B.V. (Netherlands)
Greyhound World Travel A G (Switzerland)
Greyhound World Travel GmbH (Austria)
Greyhound World Travel GmbH (Germany)
Greyhound World Travel Limited (United Kingdom)
Greyhound World Travel S.A.R.L. (France)
Jefferson Lines Holding Company (Minnesota) (40%)
Jefferson Lines, Inc. (Minnesota)
Midland Lines, Inc. (Minnesota)
Kerrville Bus Company, Inc. (Texas) (40%)
Kerrville Tours, Inc. (Texas)
Painter Bus Lines, Inc. (Texas)
Union Bus Center of San Angelo, Inc. (Texas)

K.G. Lines, Inc. (Delaware) (50%)
New Mexico Transportation Company, Inc. (New Mexico)
Southeastern Stages, Inc. (Georgia) (40%)
Springfield Bus Terminal Corporation (Massachusetts) (32%)
Union Bus Station of Oklahoma City, Oklahoma (Oklahoma) (20%)
WGL Properties, Inc. (Delaware)
Wilmington Union Bus Station Corporation (North Carolina) (25%)
Greyhound Overseas Service Inc. (Arizona)*
MOTOR COACH INDUSTRIES, INC. (Delaware)*
Recreation Lines, Inc. (New York)
Red Top Sedan Service, Inc. (Florida)
Romex, Inc. (Delaware)*
Royal Hawaiian Tours, Limited (Hawaii)
Texas, New Mexico & Oklahoma Coaches, Inc. (Texas) (59%)
TRANSPORTATION MANUFACTURING CORPORATION (Delaware)*
UNIVERSAL COACH PARTS, INC. (Delaware)*

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* Indicates a Bus Manufacturing Group Subsidiary

Vermont Transit Co., Inc. (Vermont)
Walters Transit Corp. (New York)

FOOD SERVICE GROUP

FABER ENTERPRISES, INC. (Delaware)
  Faber Tower Restaurants, Inc. (Illinois)
  O'Hare Drug Co., Inc. (Illinois)
GREYHOUND FOOD MANAGEMENT, INC. (Michigan)
  Glacier Park, Inc. (Arizona) (80%)
    Waterton Transport Company, Limited (Alberta)
  Greyhound Food Management of Texas Inc. (Texas) (49%)
  Restaura, GmbH (Germany) (75%)
  Restaura, S.A. (Belgium)
    Restauration Roger Lorent S.A. (Belgium)
GREYHOUND SUPPORT SERVICES, INC. (Delaware)
  GREYHOUND SERVICES SAUDI ARABIA LTD. (Saudi Arabia) (40%)
POST HOUSES, INC. (Delaware)

FOOD GROUP

ARMOUR AND COMPANY (Delaware)
  Armour Food Express Company (Delaware)
  Armour International Sales Corporation (Delaware)
  Tri-State Investment Company (Delaware) (27%)

CONSUMER PRODUCTS GROUP

ARMOUR-DIAL, INC. (Delaware)
  APC International Sales Corp. (Delaware)
  ARMOUR HANDCRAFTS, INC. (Arizona)
    Malina International Sales Corporation (Delaware)
  Ft. Madison Dial, Inc. (Iowa)
ARMOUR INTERNATIONAL COMPANY (Arizona)
  AIC International Sales Corporation (Arizona)
  Armour-Dial del Ecuador, S.A. (Ecuador)

Armour Foods (Benelux) N.V. (Belgium)
Armour Foods (Canada) Limited (Ontario)
Armour Foods (Deutschland) GmbH (Germany)
Carsten Moller Foods A.P.S. (Denmark) (50%)
Armour Foods (Italia) S.p.A. (Italy)
Armour Foods (U.K.) Ltd. (United Kingdom)
Armour Panama, S.A. (Panama)
Armour S.A.E. (Spain) (35%)
Dial Toiletries and Pharmaceuticals (Proprietary) Limited (South Africa)
Greyhound International Sales Corporation (Delaware)

FINANCIAL GROUP

GREYHOUND COMPUTER CORPORATION (Delaware)
D.S., Inc. (New Jersey)
EDP Marketing Corporation (New York)
Greyhound Computer de Mexico, S.A. de C.V. (Mexico)
Greyhound Computer of Canada Ltd. (Canada) (80%)
Canadian Computer Resources Limited (Canada)
Greyhound Computer Overseas Corporation (Delaware)
Greyhound Computer France S.A. (France)
Greyhound Computer S.A. (Switzerland)
Greyhound Computer Deutschland GmbH (Germany)
Greyhound Computer (U.K.) Limited (United Kingdom)
Greyhound Holdings Limited (United Kingdom)
PINE TOP INSURANCE COMPANY LIMITED (United Kingdom)
GREYHOUND LEASING & FINANCIAL CORPORATION (Delaware)
Boothe Leasing Corporation of Puerto Rico (Puerto Rico)
Bravo Aircraft Leasing, Inc. (Delaware)
Century Greyhound International & Financial Corporation (Japan) 35%
Century Greyhound International Finance Limited (Hong Kong)
Century Greyhound Leasing (Panama) S.A. (Panama)
(33 Panama Subsidiaries not listed individually)

Jacoby Shipping Corporation (Liberia)
Langdon Maritime Shipping, Inc. (Liberia)
Kasumigaseki Kosan Co., Ltd. (Japan) (70%)
Charlie Aircraft Leasing, Inc. (Delaware)
Echo Aircraft Leasing, Inc. (Delaware)
Financiera Greyhound, S.A. (Panama)
First Greyhound Leasing Company (Delaware)
Foxtrot Aircraft Leasing, Inc. (Delaware)
Golf Aircraft Leasing, Inc. (Delaware)
Greycas, Inc. (Arizona)
Greyhound Equipment Leasing Corporation (Delaware)
Greyhound Holding, A.G. (Switzerland)
Greyhound Financial & Leasing Corporation AG (Switzerland) 65%
Greyfin (Nassau) Limited (Bahama)
Greyfin Nederland Corporation B.V. (Netherlands)
Greyfin Services, Ltd. (United Kingdom)
Greyhound Equipment Finance, Ltd. (United Kingdom)
Elkra Investments Limited (United Kingdom)
Exosphere Limited (United Kingdom)
FEG Finance Ltd. (United Kingdom)
Greyhound Guaranty Limited (United Kingdom)
Greyhound Guarantee Nominees Ltd. (United Kingdom)
Secured Advances Ltd. (United Kingdom)
Greyhound Shipping Corporation (Liberia)
G.A.G. Corporation (Liberia)
GG Mortgagee Corp. (Liberia) (50%)
Greycal, Ltd. (Bahama)
Greyfin Corporation (Liberia)
Greyhound Inter-American Aircraft Leasing, Ltd. (Arizona)
Greyhound Leasing & Financial of Canada, Ltd. (Canada)
Greyhound Financial Inc. (Canada)
Vessel Finance Inc. (Delaware)
Greyhound Overseas Corporation N.V. (Netherlands Antilles)
Greyhound Real Estate Finance Corporation (Arizona)
Greyship Corp. (Delaware)
Hotel Aircraft Leasing, Inc. (Delaware)

Medbarge, Inc. (Delaware)
Nacional Arrendadora, S.A. de C.V. (Mexico)
Second Greyhound Leasing Company (Delaware)
Greyhound Realty Corporation (Arizona)
MCI Acceptance Corp. (Delaware)
Morga Investment Co. (Arizona)
VEREX CORPORATION (Arizona)
CMI Plaza Properties, Inc. (Wisconsin)
Liberty Mortgage Insurance Corporation (Wisconsin)
Management Data Systems, Inc. (Wisconsin)
Verex Assurance, Inc. (Wisconsin)
Commercial Mortgage Insurance, Inc. (Wisconsin)
Verex Indemnity Corporation (Wisconsin)
Verex MBC Funding Corporation (Wisconsin)
Verex Mortgage Corporation (Wisconsin)
Verex Relocation Services, Inc. (Wisconsin)
Verex Securities, Inc. (Wisconsin)
Verex Services, Inc. (Wisconsin)
Pine Top (Bermuda) Ltd. (Bermuda)
PINE TOP INSURANCE COMPANY (Illinois)
Pine Top Services Company (Arizona)
Pine Top Syndicate, Inc. (New York)
Pine Top Life Company (Arizona)
Shorrock Inc. (Maryland)
SHORROCK SECURITY SYSTEMS LIMITED (United Kingdom)
Shorrock Developments Ltd. (United Kingdom)
TRAVELERS EXPRESS COMPANY, INC. (Minnesota)
Travelers Express Co. (P.R.) Inc. (Puerto Rico)

SERVICES GROUP

Air Agency, Inc. (Florida)
Aircraft Service, Inc. (Florida)
AIRCRAFT SERVICE INTERNATIONAL, INC. (Delaware)
International Air Service of Puerto Rico, Inc. (Puerto Rico) (97%)

Bahamas Airport Services Limited (Bahama)
Freeport Flight Services Limited (Bahama) (80%)
Nassau Air Dispatch Service, Limited (Bahama) (80%)
DISPATCH SERVICES, INC. (Florida)
Florida Aviation Fueling Company, Inc. (Florida)
FLORIDA EXPORT TOBACCO CO. INC. (Florida)
Florida Export Warehouse Corp. (Florida)
Greyhound C&D, Inc. (Delaware)
CONSULTANTS & DESIGNERS INC. (Delaware)
Award Advertising Agency, Inc. (New York)
Canadian Consultants & Designers, Limited (Canada)
Canadian Design Service Co. Limited (Canada)
Consultants & Designers (U.K.) Limited (United Kingdom)
GREYHOUND EXHIBITGROUP INC. (Delaware)
Exhibitgroup (Canada) Ltd. (Canada)
Matrix Group, Inc. (Georgia)
GREYHOUND TEMPORARY PERSONNEL, INC. (New York)
Greyhound Permanent Personnel Inc. (New York)
GREYHOUND EXPOSITION SERVICES, INC. (Florida)
GREYHOUND RENT-A-CAR, INC. (Florida)
Greyhound Rent-A-Car of Orlando, Inc. (Florida) (49%)
International Cruise Shops, Inc. (Florida)
Las Vegas Convention Service Co. (Nevada)
Research Information Center, Inc. (Delaware)

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Assure Competitive Transp., Inc. v. United States, 629 F.2d 467 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981) ("*Assure I*"). 19,20

Capitol Bus Co. v. United States, No. 82-1380 (D.C. Cir., filed April 5, 1982). 8

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FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981). 7,12,13 16,18,19

Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979). 13

Greyhound Corp. v. ICC, 551 F.2d 414 (D.C. Cir. 1977); 668 F.2d 1354 (D.C. Cir. 1981). 8,12

Greyhound Lines, Inc., Extension-Ft. Collins, Co., No. MC-1515 (Sub. No. 306) (June 10, 1982). 8

Howard H. Krapf Extension-Cinders, 76 M.C.C. 103 (1958). 22

Howard Sober, Inc., Extension-Secondary Truckaway Minnesota, 88 M.C.C. 755 (1962). 22

Ligon Specialized Hauler, Inc. v. ICC, 587 F.2d 304 (6th Cir. 1978). 26

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May Trucking Co. v. United States, 593 F.2d 1349 (D.C. Cir. 1979). 19

North American Van Lines, Inc. v. United States, 412 F. Supp. 782 (N.D.Ind. 1976). 26

Pan-American Bus Lines Operation, 1 M.C.C. 190 (1936). 19,20

P. C. White Truck Line, Inc. v. ICC, 551 F.2d 1326 (D.C. Cir. 1977). 19

St. Johnsbury Trucking Co., Inc., Extension-Heavy Hauling, 53 M.C.C. 277 (1951). 23

Sharron Motor Lines, Inc. v. United States, 633 F.2d 1115 (5th Cir. 1981). 19

Trailways, Inc. v. ICC, 676 F.2d 1019 (5th Cir. 1981) ("*Trailways (Lincoln)*"). 8,10,11

Trailways, Inc. v. ICC, 659 F.2d 1071 (*mem.*) (3d Cir. Apr. 20, 1981) ("*Trailways (Atlantic City)*"). 8,11

Truck Transport Inc. v. ICC, 631 F.2d 1023 (D.C. Cir. 1980). 22

United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515 (1946). 21,22,23,24

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978). 13,16,18,19,22

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Ex Parte No. MC-133, Entry Flexibility—Regular-Route Passenger Service, 44 Fed. Reg. 64845 (Nov. 8, 1979). 5,15,21,22,24

Ex Parte No. MC-121, Policy Statement on Motor Carrier Regulation, 44 Fed. Reg. 60296 (Oct. 19, 1979). 11,12,14,15,16,17,18,19,20

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Reference to the Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit is officially reported at 673 F.2d 514 and at ___ U.S. App. D.C. ___ and is unofficially reported at 1982 Fed. Carr. Cas. ¶82,893.*

* The District of Columbia Circuit amended its opinion by order June 4, 1982. App. 24. References to the Appendix will be made as "App."

Statement of Grounds of Jurisdiction

(i) The judgment sought to be reviewed was entered on March 16, 1982. App. 1. The District of Columbia Circuit amended its opinion on June 4, 1982. App. 24.

(ii) The District of Columbia Circuit denied the petition for rehearing with suggestion for rehearing *en banc* of Greyhound Lines, Inc. on May 14, 1982, App. 25, and denied the petition for rehearing with suggestion for rehearing *en banc* of the Interstate Commerce Commission on June 4, 1982.

(iii) Not applicable.

(iv) This Court has jurisdiction to review the judgment in question by writ of certiorari pursuant to 28 U.S.C. §§1254(1) and 2350(a).

STATUTES AND REGULATIONS INVOLVED

The Interstate Commerce Act, 49 U.S.C. §10922(a) (1982),* provides:

> §10922. *Certificates of motor and water common carriers*
>
> (a) Except as provided in this section and section 10930(a) of this title, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title as a motor common carrier of passengers or water common carrier, respectively, if the Commission finds that—
>
> (1) the person is fit, willing, and able—

---

* Section 10922 of the Interstate Commerce Act is set forth in full at App. 110.

> (A) to provide the transportation to be authorized by the certificate; and
>
> (B) to comply with this subtitle and regulations of the Commission; and
>
> (2) the transportation to be provided under the certificate is or will be required by the present or future public convenience and necessity.

The Administrative Procedure Act, 5 U.S.C. §706(2)(A) (1966),* provides:

> §706. *Scope of review*
>
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .

Rule 80 of the Interstate Commerce Commission's Rules of Practice, 49 C.F.R. §1100.80 (1981), provides in part:

> §1100.80. *Evidence; records in other Commission proceedings. (Rule 80)*

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* Sections 553 and 706 of the Administrative Procedure Act are set forth in full at App. 107, 108.

> If any portion of the record before the Commission in any proceeding other than the one on hearing is offered in evidence a true copy of such portion shall be presented for the record in the form of an exhibit. . . .

STATEMENT OF THE CASE

On October 17, 1978, petitioner Greyhound Lines, Inc. ("Greyhound") filed with the Interstate Commerce Commission ("ICC") an application to remove an archaic "closed-door" restriction on its operating authority between Texarkana, Texas and Memphis, Tennessee. The restriction prohibited Greyhound, which made a rest stop in Little Rock, Arkansas, from taking on or discharging passengers there. Its removal allowed Greyhound to provide a direct, faster service between Little Rock, on the one hand, and Texarkana and Memphis, on the other, than its existing circuitous routes permitted. *See* map at App. 95. Respondent Arkansas Motor Coaches, Ltd., Inc. ("Arkansas Motor"), a wholly owned subsidiary of Trailways, Inc., also served those three points.

Respondents Trailways, Inc., its subsidiaries and affiliates (collectively "Trailways") filed with the ICC a protest to Greyhound's application and the ICC directed use of the modified procedure suitable for routine applications.

Pursuant to the ICC's modified procedure, Greyhound and Trailways submitted verified statements to Review Board 3 of the ICC. Trailways therein argued that a grant of this authority to Greyhound would have an adverse impact not only on Arkansas Motor, but also on the whole Trailways' system and all small carriers. App. 100-105. Although the statement reported Trailways' estimates of direct diversion drawn from a simplistic analysis of travel (rejected by Review Board 3) not only over Arkansas Motor's lines, but all of those of Trailways,

it contained no evidence or offer of evidence on any of Trailways' broader claims.

On February 8, 1980, Review Board 3 served its decision granting Greyhound's application. App. 34. It concluded that a grant of authority to Greyhound would not materially adversely affect Arkansas Motor or its parent, Trailways, since the likelihood of substantial diversion of Trailways' traffic was remote. App. 39-40. Moreover, it held that "[o]n balance, the benefits to the public from applicant's more expeditious service upon a grant far outweigh any detriment to existing carriers shown by this record." App. 40.

In its exceptions to the Review Board's decision, Trailways requested the ICC to take official notice of unsworn comments of counsel Trailways filed on February 7, 1980 in a proceeding regarding proposals for rulemaking, Ex Parte No. MC-133, *Entry Flexibility—Regular-Route Passenger Service* ("MC-133"). App. 77.

On June 17, 1980, a three-member panel of the ICC, Division 1, issued its opinion affirming the Review Board's decision. App. 30. Subsequently, on September 23, 1980, the ICC issued a certificate of public convenience and necessity to Greyhound which authorized it to commence the proposed service at Little Rock. That service has continued without interruption from that date.

On March 27, 1981, Trailways filed its petition for review with the District of Columbia Circuit pursuant to 28 U.S.C. §§2342-43. On March 16, 1982, the Court of Appeals reversed the order of the ICC. App. 1. It held, in substance, not only that the ICC had acted arbitrarily and capriciously by not considering, in implementing the statutory standard of "public convenience and necessity," 49 U.S.C. §10922(a), the effect an award of such authority to Greyhound might have on the whole Trailways system, but also that the ICC had "evaded" its responsibilities:

"We are aware that the 'consideration' lacking in this case and called for on remand may require an in-depth study of the competitive structure of the intercity bus market to which an adjudicatory-type proceeding may not normally be conducive. We also do not ignore the discretion commonly accorded agencies in the ordering of their own proceedings. We are simply concerned that by a combination of circumstances the ICC has been able to evade an important, even if it is also likely to be a difficult, element of a reasoned decision on Greyhound's application—the matter of assessing the structure of the bus market and determining if there is any detriment to public interest arising from the incremental impact on Trailways' competitive position of granting Greyhound an authority which, in all other respects, seems quite reasonable.

• • •

"The sum and effect of these circumstances is that the Commission, by one way or another, has evaded or otherwise missed a full consideration of the broad question of the long-term effects of incremental increases of Greyhound's market share on the greater public interest of which the ICC is statutory guardian. We find Trailways' argument to the Commission persuasive: even in a 'small' authority application, an award which eliminates a competitive edge in a carrier other than Greyhound is an effective shift of that edge to Greyhound. . . . The Commission should not allow Greyhound to grow larger without careful and detailed examination of *all* aspects of public interest, including the long-range interest in continuing competition in the market." App. 18-19. (Footnote omitted). (Emphasis in original).

It also held that the ICC erred in finding it could not properly take official notice of Trailways' MC-133 comments. App. 21-22.

Both Greyhound and the ICC filed petitions for rehearing with suggestions for rehearing *en banc*. Greyhound's petition was denied on May 14, 1982 with an attached memorandum indicating that the District of Columbia Circuit would be making changes in the principal opinion. App. 25-26. The ICC's petition and suggestion were denied on June 7, 1982, with Judges MacKinnon and Bork voting for rehearing *en banc*. App. 28, 29. On June 4, 1982, the District of Columbia Circuit amended its opinion to modify two passages which had referred to monopoly power or monopolistic position in connection with Greyhound. App. 24. On June 16, 1982, the District of Columbia Circuit granted Greyhound a thirty-day stay pending its petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Preliminary Statement

Despite this Court's condemnation of judicial intrusion into areas of agency discretion, most recently in *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981), that problem persists and requires further remedial review. The record below presents a particularly striking example of the substitution by a reviewing court of its own special notions of how an administrative agency should apply its expertise and whether it may enforce compliance with its own rules.

In reversing a "small" authority grant, the District of Columbia Circuit sought to redress 45 years of regulation of the two largest bus carriers and competitive relationships in the entire intercity bus industry. In so doing, the District of Columbia Circuit has created conflicts with decisions of the

Third, Fifth and Seventh Circuits and even its own precedents, which cannot be resolved without review. Trailways has unsuccessfully made to the Third and Fifth Circuits virtually the same contentions regarding alleged competitive injury from ICC orders involving service to Lincoln, Nebraska and Atlantic City, New Jersey. *Trailways, Inc. v. ICC*, 676 F.2d 1019 (5th Cir. 1981) ("*Trailways (Lincoln)*"). App. 42. *Trailways, Inc. v. ICC*, 659 F.2d 1071 (*mem.*) (3d Cir. Apr. 20, 1981) ("*Trailways (Atlantic City)*"). Other carriers have unsuccessfully challenged the very rulemaking and policy statement regarding burden of proof which the ICC applied below, *Assure Competitive Transp., Inc. v. United States*, 635 F.2d 1301 (7th Cir. 1980) ("*Assure II*"). Finally, the decision below, in its emphasis on petitioner's size as justifying calls for radical modifications in ICC entry procedures and rules, conflicts with one of its own prior decisions criticizing the ICC for just that sort of discriminatory mode of proceeding, *Greyhound Corp. v. ICC*, 668 F.2d 1354 (D.C. Cir. 1981) and 551 F.2d 414 (D.C. Cir. 1977), which also smacks of heretofore invalidated "fitness flagging", *Virginia Appalachian Lumber Corp. v. ICC*, 606 F.2d 1385 (D.C. Cir. 1979).

The decision below has been seized upon by Trailways and other protestants seeking delay, virtual elimination of the need for them to prove unsupported contentions of injury to competition and to competitors, and a return to anticompetitive entry barriers. Thus, Trailways has recently asserted to the ICC, on the authority of the decision below, that Greyhound should not be granted authority over a route serving Fort Collins, Colorado, which Trailways had *abandoned*, *Greyhound Lines, Inc., Extension—Ft. Collins, Co.*, No. MC-1515 (Sub. No. 306) (June 10, 1982). App. 54. Another group of protesting carriers, on the basis of the decision below, sought review and moved for a stay in the District of Columbia Circuit; both the petition and motion are currently pending. *Capitol Bus Co. v. United States*, No. 82-1380 (D.C. Cir., filed April 5, 1982). The court below directed how the ICC should define and implement

a statutory standard of "public convenience and necessity," imposing on it the duty to consider broad industry conditions on the basis of mere contentions of competitive injury and to disregard the burden of proof on protestants in the special case of claims of such injury against the largest bus carrier by the second largest. It also proceeded to direct how the ICC should act upon submissions which do not conform to its own rules and standards of form, timeliness or competence. It makes novel, radical and discriminatory changes in settled agency procedures and overrides established agency rules and practices.

The immediate practical consequences for the transportation industry are significant. Successful judicial imposition of a policy of promoting one large carrier over another in route application proceedings, which the ICC has emphatically rejected, but of which the District of Columbia Circuit approves, App. 16, would have a chilling effect, and not only upon intra- and intermodal competition generally. It could also have a chilling effect upon the many smaller carriers whose applications might be denied to protect Trailways' "competitive edge" vis-a-vis petitioner. Competition from anyone, not merely Greyhound, could arguably injure Trailways, "a vulnerable competitor." App. 18, 19.

The ICC sought to lower entry barriers; this decision could be read to foster higher ones. Moreover, its reasoning could be applied to freight carriers as well, and to localities as well as nationwide. *See*, App. 19. The effort and expense of such formless, potentially limitless and protracted proceedings are disproportionate to the authority applied for. Raising such new, higher entry barriers has significance for many localities. Had Trailways petitioned the District of Columbia Circuit rather than the Third and Fifth Circuits to review the ICC grants of Greyhound authority to serve Atlantic City, New Jersey, and Lincoln, Nebraska, respectively, residents of and visitors to those areas would not now enjoy more competitive

bus service. In view of the decision below, the plans of the ICC for a more competitive, more responsive, more fuel efficient intercity bus industry, subject to fewer outdated and uneconomic restrictions, could remain an incompletely realized concept.

I. THE DISTRICT OF COLUMBIA CIRCUIT IS IN CONFLICT WITH THE OTHER CIRCUITS

The decision below is directly in conflict with prior decisions of other circuits and of itself as to essential parts of its rationale. The most striking conflict is with a decision of the Fifth Circuit, *Trailways (Lincoln), supra.*

Trailways had made the same contentions to the ICC in a proceeding to remove a "closed door" restriction on Greyhound service to Lincoln, Nebraska similar to the one involved at Little Rock. The inadequate effort to show harm was of the same type. App. 44-45.* The ICC briefly disposed of Trailways' contentions and granted the authority; the Fifth Circuit analyzed how little Trailways had shown, as well as how much it had contended—as the District of Columbia Circuit did not—and affirmed. App. 45; *compare*, App. 16.** Implicit in the Fifth Circuit's decision is the proposition that a protestant's unsupported contentions are insufficient, both generally and under the ICC's rule on the burden of proof, to justify denial

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* The essential similarity of the two proceedings was recognized by the ICC, as was the inappropriateness of any broad study in either. *See* order consolidating four other proceedings. App. 51.

** When Division 1 of the ICC stated, "[o]therwise, petitioner's representations concerning potential systemwide harm may not be considered. . .," it referred to those representations made to it, and not to those earlier ones which did not persuade Review Board 3. App. 32. Division 1 had already discussed the record before Review Board 3 before turning to Trailways' contention that supplementary materials regarding allegedly greater diversion of revenue would substantially change the result reached by Review Board 3. Only then did Division 1 make the observation which was the critical element in the reasoning of the court below. App. 9-12. Review Board 3 had in fact considered the alleged evidence of diversion of revenue regarding both Arkansas Motor *and* Trailways and had found it wanting. App. 39-40.

of an application in other respects reasonable, or the raising of the entry barrier of protracted proceedings and "in-depth studies." The District of Columbia Circuit is alone in that novel view.

The District of Columbia Circuit's decision is also in conflict with that of the Third Circuit in *Trailways (Atlantic City), supra.* There, a memorandum decision dismissed Trailways' petition for review of an ICC order which permitted Greyhound, as well as Trailways and other carriers, to serve Atlantic City, New Jersey, despite unsupported contentions by Trailways of competitive injury nationwide from enhanced competition there. Obviously, most circuit courts require the ICC to consider evidence rather than mere assertions.

Other circuits have accepted implicitly the ICC's allocation of the burden of proof to protestants which the District of Columbia Circuit explicitly rejects. The latter rejects the ICC's requirement that a protestant show injury to the public from injury to it in order to defeat an application for authority otherwise in the public interest. The District of Columbia Circuit's reasoning is that the ICC based its burden of proof rule on a mere assumption that the rule is pro-competitive in all cases, while the reviewing court, persuaded by Trailways' argument, presumes it knows better. App. 15.

In so doing, however, the District of Columbia Circuit fails to defer sufficiently to the ICC's rulemaking authority, 5 U.S.C. §553, App. 107-108, and to the application of its expertise to the extensive comment it received in Ex Parte No. MC-121, *Policy Statement on Motor Carrier Regulation,* 44 Fed. Reg. 60296 (Oct. 19, 1979) ("MC-121"). App. 59. That position is in direct and irreconcilable conflict with that of the Seventh Circuit in *Assure II.*

The approach of the Seventh Circuit in *Assure II,* or, for that matter, of the Third and Fifth Circuits in *Trailways (Atlantic City)* and *Trailways (Lincoln), supra,* is surely closer

to that approved by this Court than is that of the District of Columbia Circuit, *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981), while the decision below is in conflict with those of the other circuits.

There is also a rather surprising internal conflict at the District of Columbia Circuit. In *Greyhound v. ICC*, *supra*, the District of Columbia Circuit strongly disapproved of the ICC's earlier efforts to treat petitioner (and its parent) differently than Trailways (and its various parents) for purposes of securities regulation. The only serious ground for such disparate treatment of Greyhound was its large size in the bus industry. Not only are these District of Columbia Circuit panel decisions self-contradictory, they violate basic principles of consistency and serve to confuse the ICC. In its petition for rehearing below, the ICC unsuccessfully sought reconciliation of these decisions and clarification of its responsibilities toward Greyhound and Trailways.

These conflicts between the District of Columbia Circuit decision below and other decisions of that circuit and of other circuits require the unifying and reconciling review which only this Court can provide. The matter is not merely of moment to Greyhound and Trailways alone; on the contrary, the decision below threatens to revive the questions about the rationality of the MC-121 policy statement which the ICC and the carriers it regulates have considered settled by the Seventh Circuit in *Assure II*.

II. THE DISTRICT OF COLUMBIA CIRCUIT HAS EXCEEDED THE BOUNDS OF PROPER JUDICIAL REVIEW AND HAS INTRUDED INTO AREAS PROPERLY COMMITTED TO AGENCY DISCRETION REGARDING COMPETITION, POLICY AND PROCEDURE

In its decision, the District of Columbia Circuit intruded into a number of areas committed to agency discretion. The first, and most sensitive area, involves the choice of means agencies (and not the courts) use to implement Congressional policy regarding competition. The second area involves agency direction of its own procedure.

A. THE DISTRICT OF COLUMBIA CIRCUIT HAS INTRUDED INTO THE IMPLEMENTATION OF POLICY BY REGARDING MERE CLAIMS OF COMPETITIVE INJURY AS IMPOSING NEW DUTIES ON THE ICC

The District of Columbia Circuit has, without a proper basis, intruded into the ICC's implementation of policy by barring its grant of route authority for the lack of a bus industry study sought by respondents on the assumption or finding that such a study had been "evaded" by the ICC, implying a duty to make one on the basis of mere allegations of respondents. It has thereby ignored and attempted to alter the balance between courts and agencies previously struck by this Court in *WNCN, supra*, and in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).* The court below may believe that a route application by the larger of the two largest bus carriers (both small in terms of the intermodal competition they both face)

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* The District of Columbia did not cite either case, in contrast with its careful distinguishing of *Vermont Yankee* in footnote 58 in *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979). The decision below raises questions whether the District of Columbia Circuit currently regards *Vermont Yankee* and *WNCN* as having application beyond their facts, or beyond the particular agencies involved.

protested by the smaller of them should trigger novel responses from the ICC. Taking judicial notice of economic conditions and history, and presuming to judge of matters properly left to those with expertise, it may believe in the necessity of elaborate consideration of the competitive balance between them, of industry structure and, especially, of claims by one of unevidenced and inadequately explained systemwide effects or of competitive vulnerability which did not convince the ICC. It may not, however, act on such beliefs, except at the risk of invading areas of agency discretion.

The ICC is charged with the responsibility of issuing certificates of authority, employing the "public convenience and necessity" standard of the Motor Carrier Act, 49 U.S.C. 10922(a). Congress has delegated it considerable discretion in the choice of means in carrying out that responsibility. One of those means has of late been through modified proceedings in which the showings required of applicant and protestant, respectively, are those set forth in MC-121.* "In-depth studies" of the structure of the industry in a "small" route authority proceeding are not among the means chosen by the ICC. That is so, whether or not Greyhound is the applicant. The choice among such means should remain where Congress placed it, with the ICC and not the courts.

The District of Columbia Circuit, however, in attempting to justify its intrusive reversal of the ICC's order and its "Instructions on Remand", asserted that the ICC has "evaded" its responsibility to assess the competitive balance between Greyhound and Trailways and the effect of a possible shift therein before granting Greyhound even a minor additional authority. The District of Columbia Circuit is seriously misinformed. Even if the ICC had never chosen to address such matters, the

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* The use, as in the Little Rock proceeding, of modified proceeding, involving written submissions only, under ICC practice is appropriate for relatively minor, routine applications. Significantly, Trailways did not seek administrative review of the ICC decision to use it in this instance.

case for judicial intervention would be insufficient. As, however, the ICC has not "evaded" any of its responsibilities, reversal and such a remand are especially improper.

Prior to the petition for judicial review, the ICC issued a December 15, 1980 legislative statement, to which several rulemaking proceedings, studies and open conferences had given rise. Many of these dealt with market structure, industry development, recommendations for easing regulations, relaxation of barriers to entry—temporary and permanent and fare flexibility: (1) *The Intercity Bus Industry, a Preliminary Study*, issued May, 1978; (2) *Report of the Bus Industry Study Group;* (3) Ex Parte No. MC-125, *Fare Flexibility for Bus Industry;* (4) Ex Parte No. MC-126, General Temporary Order No. 18, *General Temporary Authority, Regular-Route Passenger Operations;* (5) Ex Parte No. MC-121, *Policy Statement on Motor Carrier Regulation;* and (6) Ex Parte No. MC-133, *Entry Flexibility—Regular-Route Passenger Service.* App. 83, 88-89

The ICC, in the entry portion of its accompanying Section by Section Analysis, explained that it had considered, but had rejected the suggestion it discourage, or use more stringent procedures and tests for, Greyhound applications:

> "Another approach which has been suggested would be to curtail the ability of the largest carrier, Greyhound, from gaining new authority while other carriers have an opportunity to gain larger shares of the total market under the liberalized entry provisions of new legislation. [The infamous "two tier approach".] Such an approach, it is argued, is necessary to reduce Greyhound's market share of bus traffic nationally under a system of reduced regulation. We do not favor that approach for several reasons. First . . . such an approach . . . is inconsistent with a policy based on competition. Second, it reflects a 'blunt instrument' approach to a variety of different market situations, including . . . those where other carriers

have effective monopolies in certain markets.***" App. 90, 92.

That clearly articulated assessment explained not only why the ICC would not recommend the "two tier approach" to Congress, but also would not apply it in the administration of the Motor Carrier Act, including in the instant Little Rock proceeding. That assessment was made in the setting in which the "broad legislative evidence" of which the District of Columbia Circuit speaks had its proper place. When the ICC uses in adjudicatory proceedings procedures designed to protect the integrity of the record being made, such "evidence" has no necessary place. By assuming, from the adjudicatory record before it below, that the ICC had failed ever to consider such matters as a "two tier approach", the District of Columbia Circuit was led into serious error.

B. THE DISTRICT OF COLUMBIA CIRCUIT HAS IMPROPERLY ATTEMPTED TO REVERSE OR REVISE ICC POLICY CHOICES AS TO WHAT IS PRO-COMPETITIVE

The District of Columbia Circuit based its reversal of the ICC upon grounds of arbitrary and capricious action rather than lack of substantial evidence. Such grounds are inappropriately relied upon when the reviewing court's quarrel is less with the particular agency action than with the policy it embodies.

In carrying out its responsibilities, the ICC in MC-121 allocated to protestants the burden of proving that the public interest would be harmed by injury to protestants. Since protestants had an economic interest in proving such injury, the ICC's choice of that means was both rational and flexible. Its choice withstood challenge in *Assure II*. This Court has approved the use of general rules, findings and policy statements to assist in resolving particular matters in the face of dissatisfaction with their use by the District of Columbia Circuit, *WNCN, Vermont Yankee, supra.*

Trailways could, under the MC-121 method, have tried to prove its contentions instead of merely making them. But the court below appears to have concluded that, notwithstanding Trailways' failure to make a record, the ICC should have taken into consideration the impact a grant of this authority to Greyhound would have on "a market structure of which [it] should be expertly aware and which Trailways should therefore not be bound to 'prove' before using it as a basis for its argument." App. 15-16. By ignoring that burden on Trailways, the District of Columbia Circuit undermined the ICC administration of the Motor Carrier Act, including MC-121, all on behalf of a single carrier, Trailways, an alleged "vulnerable competitor." The District of Columbia Circuit's reasoning was unconvincing, and intimates a contrary policy choice on its part:

> "The Commission itself has adopted a policy that competition is to be given more weight and less emphasis is to be placed on protecting existing carriers in evaluating applications for operating authority. The *assumption* underlying this increase in the protestant's burden, however, clearly is that an application for new or expanded route authority is generally *pro*-competitive. This may be so in the great majority of cases, but not necessarily in all. The Commission should not become so enamored of procedural rules regarding burden of proof that it overlooks its perceived mission to preserve competition overall and its ultimate duty to protect the public interest." App. 15. (Emphasis in original). (Footnote omitted).

When the District of Columbia Circuit, at Trailways' request, nullified that choice in this case, it engaged not merely in judicial legislation, but in special legislation. The ICC's allocation of the burden of proof was an informed policy choice within an area committed to ICC discretion.

Worse yet, the District of Columbia Circuit has lent judicial

weight to a "two-tier approach" for a route application, with petitioner alone in the disfavored tier. Carried to its extreme, the logic of the "persuasive" argument of Trailways, that "an award which eliminates a competitive edge in a carrier other than Greyhound is an effective shift of that edge to Greyhound," could lead the ICC to engage in more elaborate consideration not only where Trailways, or any other carrier, protests a Greyhound application, but also where Trailways, a "vulnerable competitor," protests the application of any carrier wishing to compete with it. App. 18-19.

The thesis of the Court of Appeals, that the ICC's application to Trailways' contentions of the MC-121 burden of proof was "arbitrary and capricious" can only be supported if the ICC's MC-121 policy were arbitrary and capricious, in whole or in part. Such a conclusion would, however, conflict with a prior decision of the Seventh Circuit, *Assure II*.

As both *WNCN* and this case demonstrate, the District of Columbia Circuit has strong reservations about agencies using in adjudicatory proceedings any of the determinations or policies they may have reached in rulemaking or other non-adjudicatory proceedings. In that sense, the decision below is consistent not only with that reversed by this Court in *WNCN*, *supra*, but also with the decision of the Court of Appeals reversed in *Vermont Yankee*, *supra*. In all three, the District of Columbia Circuit intervened both to prevent agencies from developing policies or findings as to matters common to their authority proceedings and to broaden the scope of such proceedings to deal with such matters on a case-by-case basis.

In this instance, however, it has acted inconsistently even in terms of its own position; it has proposed an "in-depth study of . . . competitive structure . . . to which an adjudicatory-type proceeding may not normally be conducive." The District of Columbia Circuit has thereby countenanced the stretching of this "small", "closed-door" restriction proceeding to even grosser dimensions than it sought to expand radio license

transfer or renewal proceedings (in order to accommodate format change reviews, *WNCN, supra*) or nuclear power plant license proceedings (to accommodate waste disposal issues, *Vermont Yankee, supra*). In so doing, it has in effect asked the ICC to consider once again issues adequately addressed before in other ways, in MC-121, presumably in the expectation of a different, more "pro-competitive" result.

C. THE DISTRICT OF COLUMBIA CIRCUIT ENGAGED IN INAPPROPRIATE JUDICIAL REVIVAL OF SUPERSEDED ICC POLICIES AS TO BURDEN OF PROOF THAT LIMITED ENTRY AND RESTRICTED COMPETITION

In its decision below, the District of Columbia Circuit improperly intruded upon the policymaking function of the ICC by attempting to rehabilitate and use to justify its decision the superseded policies. Revival of such policies, if they are to be revived, is, however, a matter exclusively for the ICC.

Shortly after the Act became effective in 1935, the ICC developed a three-part test for route application proceedings, *Pan-American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936). Forty years later it was criticized as stifling competition, by, among others, the District of Columbia Circuit itself, *P. C. White Truck Line, Inc. v. ICC*, 551 F.2d 1326 (D.C. Cir. 1977). *See also Watkins Motor Lines, Inc. v. ICC*, 641 F.2d 1183 (5th Cir. 1981); *Sharron Motor Lines, Inc. v. U.S.*, 633 F.2d 1115 (5th Cir. 1981); *Assure Competitive Transp., Inc. v. United States*, 629 F.2d 467 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981) (*"Assure I"*); *May Trucking Co. v. United States*, 593 F.2d 1349 (D.C. Cir. 1979). The result of these criticisms was the MC-121 proceeding.

In MC-121, the ICC concluded that, because the nature of the motor carrier industry had changed dramatically since the Motor Carrier Act of 1935 and *Pan-American*, it was appropriate to place upon the protestant the responsibility for

developing the record and producing the evidence as to whether the public demand or need could or would be served as well by existing carriers. The ICC expressly overruled the second part of the *Pan-American* test, which required applicant to show inadequacy of existing service, and defined a new test. Such a redefinition of "public convenience and necessity" by the ICC was a matter committed to its judgment and discretion and as entitled to as much respect as was the original *Pan-American* test in 1936. Although the District of Columbia Circuit recognized that MC-121 had reallocated and redefined the burden of proof as to harm, footnote 48 and accompanying text, App. 15, it discussed the second part of the *Pan-American* test as if MC-121 had not overruled it. App. 7-8. The District of Columbia Circuit's reservations about that rule, as a rule, is no basis on which to undo the ICC's choice.

Nor is a contrary result compelled by *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953), cited at App. 7-8, or by *Assure I*. *Assure I* permitted the ICC to evaluate the totality of factors, rather than be bound to the elements of the outdated *Pan-American* test, which it would soon reject formally. *Assure I* is hardly precedent for requiring of the ICC a study of market structure, when the respondents, the parties making claims of injury, should have at least attempted to prove them.

What the Court of Appeals has attempted is judicial legislation, pure and simple. It is also judicial legislation at its least defensible, because, as has been seen above, the Court of Appeals is acting, not in the face of agency evasion, neglect or inaction, as it asserts in justification, but on the contrary, in the face of consistent, purposeful agency action. That the Court of Appeals may not, in this instance, accept the agency's economic rationale is no basis for judicial intervention.

D. THE DISTRICT OF COLUMBIA CIRCUIT IMPROPERLY INTRUDED INTO AGENCY PROCEDURE

1. Reversal for Agency Refusal to Accept Submissions Not in Accordance with Its Rules Was Unjustified

The District of Columbia Circuit has reversed the ICC's decision that certain unsworn arguments of counsel were not matters of which official notice could be taken, at least not in an adjudicatory authority proceeding. It cited in support *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946). The decision below is not merely in error; aided by the seeming authority of this Court, it may seriously stifle the efforts of administrative agencies, by judicious self-limitation, to ensure the receipt of only reliable evidence in proceedings which adjudicate important interests both of the public and of private parties. Whether the discretion of agencies to control their procedure, especially when they seek to impose institutional limits on the evidence they will hear in different types of proceedings, should be protected, enhanced or reduced is a significant issue. The District of Columbia Circuit, which is in effect directing that at least some adjudicatory proceedings be opened to the receipt of "broad legislative-type evidence," has sought to reduce that discretion, and has used a prior decision of this Court for that purpose. Only through review of this matter can the Court assure that its prior rulings are being correctly understood and applied in a case of considerable moment.

In this instance, the ICC rejected a submission offered to it by respondents after the initial Review Board 3 decision. The submission, of which respondents sought official notice, consisted of 157 pages of comments signed by respondents' counsel. These had been submitted in a "legislative-type" proceeding, Ex Parte No. MC-133, *Entry Flexibility—Regular-Route Passenger Service* ("MC-133"). App. 77. The submission did not comply with ICC Rule 80, 49 CFR §1100.80, and was unsworn. The ICC also declined to take official notice of these "com-

ments" as part of the record in another proceeding MC-133, as they were not ICC findings or decisions). The District of Columbia Circuit was, accordingly, in error when it reversed such refusal to take notice. App. 21-22.

The ICC treated the proffer as material subject to objections founded upon its Rule 80 as well as upon *Coastal Tank Lines, Inc., Extension—Neal, W. Va.*, 108 M.C.C. 190 (1968); it could and did reject it on both grounds. ICC rejection of submissions for failure to comply with its rules is proper. *Truck Transport Inc. v. ICC*, 631 F.2d 1023, 1027 (D.C. Cir. 1980). *See also Howard Sober, Inc., Extension—Secondary Truckaway Minnesota*, 88 M.C.C. 755, 758 (1962); *Howard H. Krapf Extension—Cinders*, 76 M.C.C. 103, 105 (1958).

Moreover, "[a]bsent constitutional constraints or extremely compelling circumstances the 'administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' " *FCC v. Schreiber*,, 381 U.S., at 290, quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S., at 143." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-44 (1978). Clearly, the ICC's refusal to take official notice of Trailways' MC-133 comments does not violate the Constitution. Likewise, Trailways' initial decision not to seek leave to submit its MC-133 comments to Review Board 3 level (comments and decisions were served within a day of each other) and failure to comply with ICC Rule 80 hardly places it in a position to assert "extremely compelling circumstances."

On the issue of taking notice, *Pierce, supra*, does not compel the result reached by the District of Columbia Circuit; on the contrary, it demonstrates the error of the decision below. In *Pierce* both proceedings were route applications, adjudicatory in nature, and covered the same route. The parties conducted them one after the one in the same place, could confront one another's witnesses (who were sworn) and stipulated to incorporation by reference of each record into the other. Only the composition of the joint boards hearing them was different;

both were decided by the ICC in a single report. On review, the district court vacated the order partially on the ground that the ICC improperly treated the two applications as consolidated by considering evidence presented in one application in deciding the other one. This Court, however, held that the Commission's treatment of the evidence was not improper because it did not result in substantial prejudice to the protestants.

A decision, such as the one below, in which virtually none of the elements in *Pierce* are present, is not compelled by *Pierce* to require notice of material such as respondents' MC-133 comments. Such a decision actually violates the spirit of *Pierce*, in which avoidance of prejudice and of judicial interference with an agency are as much a part as the permission to take notice.

The ICC appears to have the better reading of *Pierce*, and its interpretation should receive review and support from this Court. In *St. Johnsbury Trucking Co., Inc., Extension—Heavy Hauling*, 53 M.C.C. 277 (1951), the party requesting official notice charged the ICC with general knowledge of certain practices of general-commodity carriers and attached a copy of a pending ICC investigation (Ex Parte No. MC-45) concerning the topic. The ICC distinguished *Pierce* and held that it lacked the power to take official notice:

> "Our power to take official notice does not extend to records in other proceedings. In *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, cited by the parties, we had under consideration two separate applications which were closely related territorially and otherwise and these two applications were disposed of originally in a single report. Ex Parte No. MC-45 has not yet progressed to the stage of submission to the Commission and while the record in that proceeding may contain detailed evidence regarding the practices of the general-commodity carriers the circumstances of the two proceedings

> differ materially from the proceedings involved in the *Pierce* case. Accordingly the conference request in this respect will be denied." 53 M.C.C. at 289.

In the present case, MC-133 was an informal rulemaking proceeding in which no oral hearing was contemplated. 44 Fed. Reg. at 64846. App. 81. Nor were Trailways' comments "evidence," and petitioner was afforded no right of cross-examination. The ICC's decision was entirely proper and not reversible error.

2. The District of Columbia Circuit, in its Instructions on Remand, Intruded into Areas of Agency Discretion as to Control of Its Procedures

The District of Columbia Circuit in its instructions on remand, App. 18-22, intimates it is prepared to go far beyond requiring the reconsideration by the ICC of respondents' claims that the opening by petitioner of its doors to receive and discharge passengers in Little Rock (a point it already served by more circuitous means) would harm competition. In fact, the remand does not merely urge or even require the ICC now to consider matters the respondents were afforded an opportunity to prove but failed to prove the first time. These instructions are actually so intrusive and complex that they have the potential for confusing and distorting ICC route application procedures for years.

The District of Columbia Circuit appears to recognize how intrusive its instructions appear, for lip service is paid to "the discretion commonly accorded agencies in the ordering of their own proceedings." App. 18. The instructions, however, contain references to the ICC's allegedly having "evaded" one or more duties and to the "breadth of what on remand should be a careful examination of market structure and impact," App. 20, which hardly disguises the wish of the District of Columbia Circuit that its views be given the same attention as if they were commands. The opinion below presents a picture of a

court seeking to do by indirection what it implicitly realizes it cannot do openly.

The instructions the District of Columbia Circuit offers the ICC include "an in-depth study of the competitive structure of the intercity bus market to which an adjudicatory-type proceeding may not normally be conducive." App. 18.*

Finally, if the ICC were to do all that the decision below includes as "instructions", petitioner's applications would effectively be "flagged," or placed in suspense until conclusion of the "in-depth study of the competitive structure." The District of Columbia Circuit may wish that its "instructions" be so read:

> "[E]ven in a 'small' authority application . . . [t]he Commission should not allow Greyhound to grow larger without careful and detailed examination of *all* aspects of public interest, including the long-range interest in continuing competition in the market." (Emphasis in original).
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> * * *
>
> "We normally would be reluctant to direct the Commission to take up this issue in any particular proceeding. However, when after several years the issue of an anticompetitive systemwide impact, vital to reasoned decisions in individual certification proceedings involving both Greyhound and Trailways, remains unaddressed, it is time that it be considered

* The District of Columbia Court obviously would have reconsideration on remand serve as a substitute for the hearing in a consolidated proceeding involving four non-closed door route applications, a proceeding which threatened to become so unwieldy, wasteful, potentially time-consuming and uneconomic that it was abandoned by Greyhound. It does not seem to recognize the severity of the entry barrier the consolidated proceeding created, nor does it realize that respondents never sought review of the ICC order terminating the consolidated proceeding or the one which severed Little Rock from it.

> in at least some proceeding. We hold here only that the Commission may no longer fail to consider this issue and still engage in reasoned decisionmaking." App. 19-20.

The Court of Appeals has so far intruded into the procedure of the ICC as to invite the very "flagging" practice it and other circuits have previously disapproved, when done on the ICC's own initiative, pending the outcome of other hearings relating to alleged transgressions arguable touching on fitness ("fitness flagging"). *Virginia Appalachian Lumber Corp. v. ICC*, 606 F.2d 1385 (D.C. Cir. 1979), *Ligon Specialized Hauler, Inc. v. ICC*, 587 F.2d 304 (6th Cir. 1978); *North American Van Lines, Inc. v. United States*, 412 F.Supp. 782 (N.D.Ind. 1976). While the ICC may not on its own deny applicants their right, under statute, to a reasonably expeditious and inexpensive disposition of their applications for authority, the decision below would effect the same result.

CONCLUSION

This case raises substantial issues of federal administrative law and procedure and of discrimination among common carriers of passengers, as well as conflicts between the circuits, directly and by implication, which the Court should resolve. The petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should therefore be granted.

Dated: New York, New York
July 15, 1982

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1713

TRAILWAYS, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

GREYHOUND LINES, INC.,
NATIONAL TRAILWAYS BUS SYSTEM, INTERVENORS

Petition for Review of an Order of the
Interstate Commerce Commission

Argued 16 October 1981

Decided 16 March 1982

Robert Lewis Thompson with whom *Robert J. Corber* was on the brief for petitioners.

Cecilia E. Higgins, Attorney, Interstate Commerce Commission, with whom *Richard A. Allen*, General Counsel, and *Henri F. Rush*, Associate General Counsel, Inter-

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

state Commerce Commission, were on the brief for respondents. *Barry Grossman* and *Robert J. Wiggers*, Attorneys, Department of Justice, also entered appearances for respondent, United States of America.

Edward G. Villalon and *Lawrence E. Lindeman* entered appearances for intervenor, National Trailways Bus System.

Before: ROBINSON, *Chief Judge*, WILKEY and WALD, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: By this appeal petitioners seek to set aside an order of the Interstate Commerce Commission (ICC or Commission) granting authority to Greyhound Lines, Inc. (Greyhound) to serve the intermediate point of Little Rock, Arkansas, on an already authorized direct route between Texarkana, Texas, and Memphis, Tennessee. Because the authorization in question was granted without sufficient consideration of important relevant issues, we deem the Commission's action arbitrary and capricious. We vacate the Commission's order and remand for further proceedings as appropriate.

I. FACTS

On 16 October 1978 Greyhound applied to the ICC for approval of direct service to Little Rock, Arkansas, between Memphis, Tennessee, to the east and Texarkana, Texas, to the southwest. Prior to applying for this additional authority, Greyhound was serving passengers traveling from Little Rock to Memphis and beyond and from Little Rock to Texarkana and beyond, but could do so only by circuitous routes, off the interstate highway.[1]

[1] Greyhound's passengers could board at Little Rock, travel to Pine Bluff or Stuttgart, Arkansas, and transfer at one of those points to other Greyhound buses destined for Texarkana or Memphis. Brief for the Interstate Commerce Commission at 5.

Greyhound also had authority to provide direct service from Memphis to Texarkana on the interstate highway system, but could not pick up or discharge passengers or packages at Little Rock when it used this route.

Greyhound's application met opposition from Trailways, Inc. (Trailways), whose wholly-owned bus subsidiary, Arkansas Motor Coaches, Ltd., operates over the subject route. Following the submission of written evidence under the ICC's modified procedure,[2] a three-member staff review board (one member not participating) issued an interim decision granting Greyhound authority for the proposed Little Rock service.[3] The review board noted Trailways' argument that a grant of the authority to Greyhound would divert traffic and revenue from Arkansas/Trailways,[4] and it found that the traffic involved in the subject application "constitutes a considerable part of Arkansas' operations."[5] It also found, however, that the "likelihood of substantial diversion of protestant's [Trailways'] traffic is remote,"[6] and that it was "unable to conclude that the potential diversion of this traffic which a grant might precipitate would materially affect either Arkansas or its parent, Trailways."[7]

Trailways promptly petitioned for administrative review of the board's decision.[8] In its exception to the

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[2] Under this procedure, outlined in 49 C.F.R. 1100.43-1100.52, the parties submit written verified statements in lieu of oral testimony. This modified hearing procedure is intended to lend efficiency to what otherwise might require lengthy oral hearings.

[3] Joint Appendix (J.A.) at 65-71.

[4] *Id.* at 68.

[5] *Id.* at 69.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 75-114.

ruling, Trailways argued extensively the issues of systemwide harm and long-term anticompetitive impact that would result from Greyhound's authority to provide the more direct service, and claimed that the review board failed to consider this aspect of public interest. It also requested that the Commission take official notice of certain comments which Trailways had filed in another Commission proceeding (then pending) on issues of the competitive structure of the bus industry, and urged the Commission to consider the Little Rock application along with five other applications which had been filed by Greyhound at about the same time. Trailways' contention was that the six applications taken as a whole constituted important evidence of Greyhound's "continuing movement toward monopolization of the industry by selectively negating or neutralizing advantages held by [Trailways], its largest rival."[9] Trailways subsequently tendered a supplement to its exceptions, embracing "new evidence" concerning the impact that a grant of Greyhound's application would have on Trailways' systemwide operation.[10]

On 17 June 1980 a three-member commission panel (Division 1) issued a final decision granting Greyhound's

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[9] *Id.* at 166-67.

[10] *Id.* at 159-63. Trailways described the impact in terms of estimates of potential revenue diversions away from Arkansas and Trailways. The original estimate of $634,000 annually was based on 50% of the estimated total of Little Rock inbound and outbound ticket sales. Trailways maintained that, even though the figures were estimates, they were conservative and represented the minimum revenue diversion probable. As it turned out, a more accurate estimate was possible after Greyhound made the required filing of its operations under its temporary service authority over the route in question. Based on the figures of Greyhound's "G.T.O.-18" filing which offered statistics generated during Greyhound's temporary authorization to provide the subject service. Trailways maintained that diversions would exceed $725,000 annually.

application.[11] The Commission held that the arguments concerning potential systemwide harm, offered in Trailways' exceptions to the review board's decision "may not be considered, for this issue was not raised prior to the time this proceeding reached the petition stage."[12] It likewise denied Trailways' request that the ICC take official notice of the comments filed by Trailways in the other ICC proceeding, holding that the agency "may not give consideration to evidence contained in the records in those proceedings."[13] Trailways' subsequent petition for review by the full Commission, arguing that the case involved issues of general transportation impact, was also denied.

Trailways filed a petition for review in this court on 27 June 1980. On 16 September 1980 an interim stay of ICC action granted by Chief Justice Burger was vacated, and an application for stay pending judicial review was denied. A certificate of public convenience and necessity has since been issued by the ICC to Greyhound authorizing commencement of the new service at Little Rock.

II. Discussion

A. *Scope of Review*

The Administrative Procedure Act requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be [*inter alia,*] arbitrary, capricious, an abuse of discretion, [or] . . . unsupported by substantial evidence."[14] Although there may be

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[11] *Id.* at 166-68.

[12] *Id.* at 167.

[13] *Id.*

[14] 5 U.S.C. § 706(2)(A), (E) (1976). The "substantial evidence" test applies in cases subject to the adjudicatory procedures of 5 U.S.C. §§ 556 and 557. An application for a certificate of public convenience and necessity has been held

a significant practical overlap in courts' treatment of these two "standards" where both apply, they focus on two separate inquiries. The "substantial evidence" examination looks to whether the record, taken as a whole, contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [15] It looks only for a rational basis for the agency's decision in the evidence on the record; it does not include the test of whether *all* relevant and important factors were actually considered or whether the decision was made for reasons other than those offered by the agency. This latter inquiry is part of the narrower "arbitrary and capricious" review, which looks specifically to whether the action was fully informed and well-considered—"whether the [agency's] decision was based on a consideration of the relevant factors and whether there was a clear error of judgment." [16] Thus, as the Supreme Court acknowledged in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*,[17] "though an agency's finding may be supported by substantial evidence, . . . it may nonetheless reflect arbitrary and capricious action." [18]

Although this case is a close one on the question of substantial evidence,[19] we are more concerned that the

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by this court to be such a case. *C & H Transp. Co.* v. *ICC*, 589 F.2d 565, 571 (D.C. Cir. 1978), *cert. denied sub nom. Aero Trucking, Inc.* v. *C & H Transp. Co.*, 440 U.S. 911 (1979) (involving an application under the original § 207 of part II of the Interstate Commerce Act, now substantially incorporated into 49 U.S.C. § 10922 (Supp. III 1979)).

[15] *National Council of American-Soviet Friendship, Inc.* v. *Subversive Activities Control Bd.*, 322 F.2d 375 (D.C. Cir. 1963).

[16] *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971).

[17] 419 U.S. 281 (1974).

[18] *Id.* at 284.

[19] *See, e.g.*, observations in note 42, *infra*.

Commission's action under the circumstances was an abuse of its discretion and that its order cannot stand on the present record.

We are mindful of the broad expert discretion traditionally lodged in the ICC in considering and ruling on common carrier applications for authority to provide a particular service.[20] As broad as this discretion may be, however, it is not without limits.[21] Its exercise is not immune from a "thorough, probing, in-depth review,"[22] and actions which fall outside the zone of the permissible discretionary function must be rejected. We find it necessary to do so in this case.

B. *Public Convenience and Necessity*

Specific limits of the ICC's discretion to grant a carrier's application to provide service are contained in the language of the Interstate Commerce Act[23] itself. Principal among these is the provision that a certificate of authority shall be issued "*if* the Commission finds that . . . the transportation to be provided under the certificate, is or will be required by the present or future public convenience and necessity."[24]

The Commission itself early described "public convenience and necessity" in motor carrier operations in terms of a three-pronged inquiry:

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[20] *See United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535-36 (1946); *ICC* v. *Parker*, 326 U.S. 60 (1945).

[21] *See Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-68 (1962).

[22] *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415 (1971).

[23] 49 U.S.C. §§ 10101 *et seq.* (Supp. III 1979).

[24] *Id.* at § 10922(a)(2) (emphasis added).

> The question, in substance, is [1] whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; [2] whether this purpose can and will be served as well by existing lines or carriers; and [3] whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.[25]

Rather than being a strict formulaic approach, this inquiry is one way of describing the ICC's duty to identify and balance often competing interests in promoting competition, maintaining healthy economic conditions, preserving an adequate existing service, and providing for future needs,[26] and to arrive at a decision that best serves the public interest. It is not for us to say what weight ultimately should be afforded the various elements of the Commission's balance in determining "public convenience and necessity." That is a determination of fact which is the prerogative of the ICC, and it is not this court's role in the administrative arena to dictate an outcome or to reverse an agency's decision simply because we may not agree with it.[27] It is our duty, however, to ensure that the Commission has confronted all relevant—or at least significant—factors necessary to a reasoned decision. Where, as here, the contention is raised that the Commission refused or otherwise failed to address important issues of competition or control, we must closely scrutinize its action.[28]

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[25] *Pan-American Bus Lines Operations*, 1 M.C.C. 190, 203 (1936).

[26] *Trans-American Van Serv.* v. *United States*, 421 F. Supp. 308 (N.D. Tex. 1976).

[27] *See Union Mechling Corp.* v. *United States*, 566 F.2d 722, 725 (D.C. Cir. 1977).

[28] *See Denver & R.G.W.R. Co.* v. *United States*, 387 U.S. 485, 498 (1967).

C. *Contentions of Systemwide Harm*

An essential element of the decisionmaking process, and one required by the APA, is that the ICC articulate clearly the basis for its action, including its findings on factual issues. Section 8 of the Act provides,

> The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.[29]

This is not a requirement of an empty process of listing cursory findings and conclusions. Without clear disclosure of the agency's rationale, the reviewing court cannot fully perform its duty of evaluating the propriety of the Commission's actions, by whatever standard is appropriate. As stated by the Supreme Court in *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*,[30]

> A reviewing court must be able to discern in the Commission's actions the policy it is now pursuing so that it may complete the task of judicial review . . . .
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> [A] simple examination of the order being received is frequently insufficient to reveal the policies that the Commission is pursuing. Thus, this Court has relied on the "simple but fundamental rule of administrative law," *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), that the agency must set forth clearly the grounds on which it acted. For "[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 511 (1935).[31]

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[29] 5 U.S.C. § 557(c)(A) (1976).

[30] 412 U.S. 800 (1973).

[31] *Id.* at 805-07.

This principle has been the foundation of courts' analyses on many occasions.[32]

The thrust of Trailways' position is that the ICC's decision granting Greyhound authority to "open its doors" at Little Rock on its direct route between Memphis and Texarkana was made on an incomplete balance. Specifically, it argues that the Commission failed to consider the systemwide impact that a grant of Greyhound's application would have on Trailways, its subsidiaries, and the bus transportation industry in general. This is the issue with which the court is concerned. The record of the ICC's action in Greyhound's application does not clearly reveal whether the Commission understood the nature of Trailways' arguments and considered them in balancing the interests involved.

There is no question that the appropriate focus in Commission considerations of any adverse impact on other carriers, adverse also to public interest, is *systemwide*. This principle has been recognized by the Commission itself in other cases. In *Arrow Transportation Co.*,[33] the Commission categorically rejected the suggestion that it lawfully may focus its attention regarding potential harm more narrowly: "[T]he Commission intends to and does consider not only the effect of a competitive service in a proposed traffic lane, *but also the effect of a competitive service in protestants' overall operations.*"[34] In this case also the Commission agrees that the appropriate focus

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[32] *E.g.*, *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 16[illegible] (1962); *Argo-Collier Truck Lines* v. *United States*, 611 F.2d 149, 152-53 (6th Cir. 1979); *Humboldt Express* v. *ICC*, 567 F.2d 1134 (D.C. Cir. 1977); *Monumental Motor Tours* v. *United States*, 316 F. Supp. 663, 668-70 (D. Md. 1970).

[33] 131 M.C.C. 941, 942 (1980), *appeal pending sub nom.*, *Pacific Intermountain Express Co.* v. *United States*, No. 80-7251 (9th Cir.).

[34] *Id.* at 942 (emphasis added).

on any potential harm is systemwide. In fact it maintains in its brief that it "evaluated the potential harm to Trailways' overall operations—its system—as well as the harm to the Trailways' subsidiary that serves the traffic lane at issue, based on the evidence properly submitted by Trailways."[35] Unfortunately, a *post hoc* rationale offered on appeal does not fill a gap existing in the agency's contemporaneous explanation of its decision, nor therefore remedy a deficiency underlying the original action. There is a grand difference between what the Commission argues before this court and what the record shows, both in quantity and quality.

First, it is not at all clear that the Commission actually did look at systemwide harm to any degree. Second, even if we were to accord the ICC the benefit of our doubt to find that it did consider systemwide impact to some extent, its focus was shallow at best. The review board's decision evidences no confrontation with Trailways' principal contention that its evidence of systemwide harm should be considered in the context of the overall structure of the intercity bus market and of Greyhound's and Trailways' relative positions in that market.

1. *It is not clear that systemwide impact was considered.*

Trailways' protests before the Commission's review board were based on arguments that a grant of authority to Greyhound to provide the Little Rock service would potentially result in significant traffic diversion and an annual revenue loss of more than $600,000, which would have an adverse impact on Arkansas Motor Coach and Trailways' competitive position in the market. Greyhound countered with an argument that Trailways' figure exaggerated the financial impact on Arkansas Motor

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[35] Brief for the Interstate Commerce Commission at 23 n.11.

Coach, because it was not prorated to reflect the losses only within Arkansas' area of service.[36]

The review board's decision acknowledged both Trailways' and Greyhound's arguments but made no specific finding.[37] As the Commission's Division 1 observed in reviewing that decision, "[I]t is not clear whether the review board accepted [Trailways'] representation, or agreed with applicant that petitioners' data exaggerate the potential harm."[38] The review board noted that "passenger and express traffic between the named points constitutes a considerable part of Arkansas' operations."[39] It stated, however, without any discussion, that it was "unable to conclude that the potential diversion of this traffic which a grant might precipitate would materially adversely affect either Arkansas or its parent, Trailways."[40] The decision offers no indication of what this "potential diversion" might be; it states only that "the likelihood of substantial diversion of protestants' traffic is remote."[41] There is no articulated explanation of the basis for these findings, and the conclusory statements alone do not satisfy us that the review board considered impacts on the entire system, rather than impacts only

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[36] Trailways estimate was based on annualized figures from a study over a ten-day period in July 1979 of tickets sold at Little Rock for Memphis and points beyond, and Texarkana and points beyond. No survey was made of inbound traffic, but it was the witness' opinion that the volume of inbound traffic, over time, would roughly equal outbound traffic. It was offered that 50% of this total, or $633,910 (½ × $1,267,820) could actually be diverted. J.A. at 56-57.

[37] *Id.* at 68.

[38] *Id.* at 167.

[39] *Id.* at 69.

[40] *Id.*

[41] *Id.*

on Arkansas' position as the carrier most directly affected in the Memphis-Texarkana corridor.[42]

2. *The Commission failed to address Trailways' principal contentions.*

Even if the review board actually did consider a potential systemwide impact of Greyhound's proposed service, as it contends, its focus was a shallow one, sidestepping the real issues involved. The Commission argues that it

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[42] There are other conclusions included in the board's decision which are unsupported on the record, and which, to the extent they may have influenced the ICC's conclusions, detract further from the Commission's contention that it carefully balanced all relevant factors. One conclusion in particular evidences a rather perfunctory approach to the whole matter by the ICC. In what we assume was an attempt to demonstrate a consideration of whether the "useful public purpose" benefitted by authorizing Greyhound's service to Little Rock "can and will be served as well by existing carriers" ("element" 2 of the *Pan-American* guidelines, *see* text accompanying note 25 *supra*), the board's decision announced categorically that Arkansas "is unable to provide the entire proposed service." J.A. at 69. Not only does the board offer no basis for its conclusory statement on this factor, but the conclusion itself is unfounded on the record. Trailways concedes that because of deviations from the limited access highway for "about sixteen miles between Hope and Prescott, Arkansas (and along two minor segments at Little Rock and Memphis)," its existing service between Memphis and Texarkana, via Little Rock, does not match Greyhound's newly authorized route mile for mile. J.A. at 104-05. It maintains, however, that its transit times are allegedly "within a few minutes" of the transit time under Greyhound's schedule. This court has observed that "[w]hile we recognize that a finding of inadequacy of existing service is not always indispensible to the conclusion that the proposed service comports with public convenience and necessity, . . . it is, nevertheless, an *important* factor in any section 207 determination." *C & H Transp. Co.* v. *ICC*, 589 F.2d 565, 573 n.16 (D.C. Cir. 1978) (emphasis added). It follows that any relevant conclusion concerning this factor must be based on substantial evidence, which is lacking in this case.

considered "all relevant decisional factors," [43] balancing "the need for Greyhound's service against the small potential harm to Trailways if Greyhound diverted some of its revenue." [44] It notes that the ICC's final decision, issued by Division 1, corrected an error in the review board's recitation of the figures offered as evidence of Trailway's potential revenue diversion, but otherwise, "the final decision adopted the discussion of the harm issue in the review board decision." [45]

The final Commission decision intimates that Trailways' evidence of revenue diversion was not enough to satisfy its burden of demonstrating adverse consequences, and further states, "Otherwise, petitioner's representations concerning potential systemwide harm may not be considered, for this issue was not raised prior to the time this proceeding reached the petition [for reconsideration] stage." [46] This conclusion avoids the essence of Trailways' arguments which accompanied its evidence of revenue diversion. Its contention, unanswered by the Commission at any stage of the administrative proceeding, was that, notwithstanding the benefits to Greyhound passengers using the altered specific service, in the long run *competition in the industry as a whole would not be promoted* by a grant of authority to Greyhound. On the contrary, it would be harmed, "for [the authority] will enable the dominant carrier, Greyhound, to grow larger at the expense of the competitor, Trailways." [47] Contrary to Division 1's observation in its final decision, this issue *was* raised before the review board.

We recognize that the "burden" commonly assigned to the protestant in an application case such as this has tradi-

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[43] Brief for the Interstate Commerce Commission at 20.

[44] *Id.* at 21.

[45] *Id.* at 23.

[46] J.A. at 167.

[47] *Id.* at 61.

tionally required more than a showing that the protestant will be harmed financially. The Commission itself has adopted a policy that competition is to be given more weight and less emphasis is to be placed on protecting existing carriers in evaluating applications for operating authority.[48] The *assumption* underlying this increase in the protestant's burden, however, clearly is that an application for new or expanded route authority is generally *pro*-competitive. This may be so in the great majority of cases, but not necessarily in all. The Commission should not become so enamored of procedural rules regarding burden of proof that it overlooks its perceived mission to preserve competition overall and its ultimate duty to protect the public interest.

The Supreme Court has described the Commission's role in considering an application, not as one which determines whether an applicant has sustained a burden of persuasion in the literal sense, but rather as a function of "weigh[ing] the competing interests and arriv[ing] at a balance that is deemed 'the public convenience and necessity.' "[49] In *Assure Competitive Transportation, Inc.* v. *United States*,[50] the Seventh Circuit found in this Supreme Court language support for "the Commission's suggestion that it may not be bound by the formal burden of proof requirements but instead is to evaluate the *totality of factors*."[51] The "totality of factors" in this case includes

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[48] Ex Parte No. MC-121, *Policy Statement on Motor Carrier Regulation* (30 November 1978); *see also Liberty Trucking Co., Ext.—General Commodities*, 130 M.C.C. 243, 246 (1978), *aff'd*, 131 M.C.C. 593 (1979), *aff'd sub nom., Assure Competitive Transp.* v. *United States*, 629 F.2d 467 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981).

[49] *Bowman Transp.* v. *Arkansas-Best Freight Sys.*, 419 U.S. 281, 29 (1974).

[50] 629 F.2d 467 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981).

[51] *Id.* at 479 (emphasis added).

a market structure of which the ICC should be expertly aware and which Trailways should therefore not be bound to "prove" before using it as a basis for its argument.

The product of over forty-five years of government regulation since the enactment of the Motor Carrier Act [52] in 1935 is an intercity bus industry which unquestionably is largely dominated by Greyhound. The ICC itself acknowledged this dominate position in *California Parlor Car Tours Co.—Purchase—The Greyhound Corporation.*[53] The Commission in fact embarked upon a deliberate program in the 1960's to strengthen the Trailways' system in order "to make the system a more effective competitor of Greyhound." [54]

The record before us does not give any clear indication of exactly how large a portion of the bus market Greyhound holds. However, it does contain clear contentions by Trailways to the ICC and obviously relevant to the application:

> [E]very award of authority that this commission makes to Greyhound—because of Greyhound's already enormous domestic route system, the impact of single system service, and the like—tends to increase Greyhound's 70% market share (and reduce the market share of the rest of the industry) and to make it more difficult for existing carriers to compete with Greyhound and for additional competition to develop in the future.
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> . . . .

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[52] Part II of the Interstate Commerce Act, ch. 498, 49 Stat. 543 (1935) (codified as amended at 49 U.S.C. §§ 301-1150 (1976)) (revised in 1978 with the passage of the Revised Interstate Commerce Act, 49 U.S.C. §§ 10101 *et seq.* (Supp. III 1979)).

[53] 127 M.C.C. 343, 352 (1978).

[54] *Interstate Investors, Inc.* v. *United States*, 287 F. Supp. 374, 391 (S.D.N.Y. 1968), *aff'd*, 393 U.S. 479 (1969).

> [W]hen one steps back from the application and takes into account the structure of the industry and, in particular, Greyhound's overwhelming dominance of it, the public interest considerations in a rejection of the Greyhound application are undeniable.[55]

We do not, of course, rule on the validity of these arguments; that is for the Commission alone to determine in its expert discretion, soundly exercised. We hold only that, whatever Greyhound's actual statistical position is in the market, whether it is actually monopolistic or not, an argument that it has a real ability to inflict harm[56] on its competitors should not lightly be discounted before granting it increased authority.

One of the express goals of the national transportation policy is "to encourage sound economic conditions in transportation, *including* sound economic conditions among carriers."[57] This court has stated before, and we reemphasize here, that "[i]njury to existing carriers through competition becomes relevant . . . when there is corresponding injury to the public. Congress designed the Interstate Commerce Act to benefit the people, *not to create protected monopolies for those who profess to serve*

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[55] J.A. at 78, 110.

[56] This ability has been recognized in other cases, *see, e.g., Greyhound Corp.* v. *Mount Hood Stages, Inc.*, 437 U.S. 322, 337 (1978).

[57] 49 U.S.C. § 10101 (Supp. III 1979) (emphasis added). The Supreme Court has observed that "[t]he very fact that Congress has seen fit to enter into comprehensive regulation of [in that case, the communications industry] . . . contradicts the notion that national policy unqualifiedly favors competition." *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 93 (1953). *Cf. Hawaiian Tel. Co.* v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974) (entire theory of government regulation is based on a belief that competition is not the effective regulator in some industries that it is in others).

the public." [58] If the Commission is to be true to its duty in cases of this sort to balance convenience to the applicant and any adverse impact or injury to the public as a whole, the harm inflicted by a monopolist or a near monopolist on a vulnerable competitor, which Trailways claims to be, deserves especially careful attention. It received none in this case. We find in this failure alone sufficient reason to declare the Commission's ultimate conclusions and its decision arbitrary and capricious and to order that this matter be remanded for reconsideration.

D. *Instructions On Remand*

We are aware that the "consideration" lacking in this case and called for on remand may require an in-depth study of the competitive structure of the intercity bus market to which an adjudicatory-type proceeding may not normally be conducive. We also do not ignore the discretion commonly accorded agenices in the ordering of their own proceedings. We are simply concerned that by a combination of circumstances the ICC has been able to evade an important, even if it is also likely to be a difficult, element of a reasoned decision on Greyhound's application—the matter of assessing the structure of the bus market and determining if there is any detriment to public interest arising from the incremental impact on Trailways' competitive position of granting Greyhound an authority which, in all other respects, seems quite reasonable.

As noted in the facts, at the time this single case came before the Commission, the Commission had four other cases involving Trailways challenges to Greyhound applications, which it afterwards consolidated, and an-

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[58] *May Trucking Co.* v. *United States*, 593 F.2d 1349, 1356 (citing numerous decisions of the Commission) (emphasis added).

other single case which it did not.[59] However, after the Commission had acted on the application at issue here, Greyhound prudently dismissed all four of the applications which had been consolidated. The vehicle of a consolidated proceeding thus is no longer available to determine the broad issue of any potential anticompetitive impact of Greyhound's activities. At oral argument the Commission pointed to a third procedure, a rulemaking begun in 1979, as the appropriate forum in which the competitive positions of Greyhound and Trailways would be evaluated. Under normal circumstances, we would accord the greatest deference to this argument. However, the Commission has suspended further development of this rulemaking proceeding on the ground, also prudent, that Congress is engaged in a look at the whole motor carrier industry, and at the intercity bus industry in particular, and that it would be a waste of the Commission's time to continue with this rulemaking proceeding.

The sum and effect of these circumstances is that the Commission, by one way or another, has evaded or otherwise missed a full consideration of the broad question of the long-term effects of incremental increases of Greyhound's market share on the greater public interest of which the ICC is statutory guardian. We find Trailways' argument to the Commission persuasive: even in a "small" authority application, an award which eliminates a competitive edge in a carrier other than Greyhound is an effective shift of that edge to Greyhound, a clear (or at least a near) monopoly power created by the ICC.[60] The Commission should not allow Greyhound to grow larger without careful and detailed examination of *all* aspects of public interest, including the long-range interest in continuing competition in the market.

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[59] The Fifth Circuit case was disposed of by order without published opinion. *Trailways, Inc.* v. *ICC*, 656 F.2d 698 (1981).

[60] J.A. at 77.

We normally would be reluctant to direct the Commission to take up this issue in any particular proceeding. However, when after several years the issue of an anticompetitive systemwide impact, vital to reasoned decisions in individual certification proceedings involving both Greyhound and Trailways, remains unaddressed, it is time that it be considered in at least some proceeding. We hold here only that the Commission may no longer fail to consider this issue and still engage in reasoned decisionmaking.

The breadth of what on remand should be a careful examination of market structure and impact may prompt the Commission to permit the parties to introduce broad legislative-type evidence relevant to the issue of the overall impact of Greyhound authority over Trailways' operations. Trailways sought to introduce similar evidence before Division 1 in the form of "comments which it recently had filed in a pending Commission proceeding," [81] by requesting that the Commission take official notice thereof. The Commission refused to do so, holding that "while we may take official notice of other Commission proceedings and the findings therein, *we may not give consideration* to evidence contained in the records in those proceedings." [82]

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[81] Brief for Petitioners Trailways, Inc., *et al.*, at 22. These comments are described as containing

> an exhaustive analysis of the interdependence of the various segments of the Trailways and NTBS [National Trailways Bus System] route systems, in the "ripple effect" on the entire system of significant traffic diversions on any one route, such as Little Rock. They also addressed the structure of the intercity bus industry and Greyhound's competitive advantages—such as its superior "feed" traffic, its intrastate monopoly routes, and its dominance of vertically related areas such as bus manufacturing, terminal facilities, bus repair facilities—which intensifies its capacity to accomplish substantial traffic diversions from its weaker competitors such as Trailways.

Id. at 23.

[82] J.A. at 169 (emphasis added).

We are not necessarily satisfied with Trailways' timing or with the manner by which it attempted to introduce this material into the proceeding under review. The Commission and Greyhound both raise valid points that the admission of this evidence at the time it was offered may have had the effect of cutting out Greyhound's chance to reply to the material involved. Had the Commission actually exercised its discretion and decided that the circumstances dictated that it not notice the record in the other proceeding, we would be hard pressed to find issue with that decision. In this case, however, the Commission's decision was *not* an exercise of discretion one way or the other; it was bottomed squarely upon a statement and apparent belief that the ICC *could not* lawfully notice the record in the other proceeding. In this it was clearly wrong.

The controlling standards on this issue were established over a quarter-century ago in a case which, like this one, involved the power of the ICC in a motor carrier licensing proceeding to take official notice of evidence adduced in another proceeding. In *United States* v. *Pierce Auto Freight Lines, Inc.*,[63] the Supreme Court held that as long as all parties in the case at bar were also parties to the other proceeding, the consideration of evidence adduced in the other proceeding cannot be prejudicial and is entirely lawful.[64] The Commission itself recently restated the correct standard in *Airfield Service Co. Extension—Bradley International Airport*:[65]

> The Commission, of course, may properly take official notice of reports issued in other proceedings before

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[63] 327 U.S. 515 (1946).

[64] *Id.* at 528-30. *Accord, NLRB* v. *Harrahs Club*, 403 F.2d 865, 873 (9th Cir. 1968); *Moon* v. *Celebrezze*, 340 F.2d 926, 929 (7th Cir. 1965); *Blue Bird Coach Lines, Inc.* v. *United States*, 328 F. Supp. 1331, 1336 n.10 (W.D.N.Y. 1971) (involving an application for intercity bus authority).

[65] 121 M.C.C. 765, 778 (1975).

> it. It may also properly take official notice of the record in such other proceedings if the parties in the instant and prior proceeding are the same, or there, at least, are no new or different parties in the instant proceeding.[66]

Greyhound and Trailways are both parties to the proceeding for part of whose record evidence Trailways sought official notice.[67] It therefore would have been entirely lawful for the Commission to take official notice in the instant proceeding of the comments filed in the rulemaking. Of course, the Commission also had discretion not to notice the evidence at issue by deciding that it would be unduly prejudicial to Greyhound to do so (although an opportunity to reply would seemingly have avoided this), but it did not exercise even this discretionary prerogative. It was clearly wrong in concluding simply that it had no power to notice it.

We expect, upon remand, that this evidence or any other evidence bearing on the issue will be introduced by both sides, according to the preferred Commission procedures. The final determination of the weights to be accorded such evidence, and its persuasive value in satisfying the "burden" upon Trailways to show material harm sufficient to justify a refusal of the Greyhound authority is of course a matter for the Commission.

III. Conclusion

In the examination of applications for new or altered service, the matter of short-term convenience is only one aspect of the public interest which the ICC's regulatory power was created to protect. We find no issue with Greyhound's contention that its service to Little Rock on the more direct route, utilizing interstate highways, is

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[66] *Id.* at 778.

[67] Ex parte No. MC-133, *Petition for Rulemaking on Entry Flexibility for Regular Route Passenger Carrier.*

more efficient than its existing service, provides a more pleasant passage for users of its system, and that there is some public interest in such convenience. Trailways claims, however, that a broader public interest is served by refusing to grant authority which tends to increase the monopolistic position Greyhound enjoys in the transit market. Whether this is so in the ultimate analysis is not a question before this court.

It should have been before the Commission; that this contention was not addressed compels the remand. This is not a case involving merely an evaluation of the *weight* of relevant factors; it involves instead a decision made on an incomplete analysis of the "public convenience and necessity" limiting the Commission's discretion. We vacate the order under review granting Greyhound's application, and remand this matter for those proceedings and deliberations which the Commission deems appropriate to a full consideration of market-related issues, and any others pertinent to the action requested.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981
No. 80-1713
FILED JUNE 4, 1982

TRAILWAYS, INC., et al.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

GREYHOUND LINES, INC., NATIONAL TRAILWAYS BUS SYSTEM,
Intervenors

Before: ROBINSON, *Chief Judge;* WILKEY and WALD, *Circuit Judges.*

ORDER

It is ORDERED, by the Court, *sua sponte*, that the Opinion for the Court filed by Circuit Judge Wilkey in the above entitled case on March 16, 1982 be, and it hereby is, amended as follows:

Page 19, beginning on line 29—the comma and the phrase "a clear (or at least a near) monopoly power created by the ICC.[60]" are deleted and substituted in their place is the new phrase "and a contribution to an already dominant position in the market.[60]"

Page 23, beginning on line 5—the phrase "increase the monopolistic position Greyhound enjoys in the transit market" is deleted, and substituted in its place is the new phrase "increase Greyhound's dominant share of the intercity bus market."

Per Curiam
FOR THE COURT

George A. Fisher
Clerk

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1713

TRAILWAYS, INC., ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

GREYHOUND LINES, INC., NATIONAL TRAILWAYS BUS SYSTEM, INTERVENORS

On Petition for Rehearing

Filed 14 May 1982

Before: ROBINSON, *Chief Judge*, WILKEY and WALD, *Circuit Judges*

ORDER

On consideration of intervenor Greyhound's petition for rehearing, it is

ORDERED by the Court that the petition for rehearing is denied.

A statement of the panel is attached.

Per Curiam

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

MEMORANDUM

Per Curiam: We have carefully considered Greyhound's petition for a rehearing in this case and have reexamined our opinion to eliminate any ambiguities which might be misread as appellate-level fact-finding. Except to the extent that it has enabled us to identify potential ambiguities (two minor changes), we find Greyhound's arguments unpersuasive. The purpose of the principal opinion in this case was to advise the ICC that it had overlooked or evaded an inquiry necessary to a reasoned decision. The opinion accomplished our purpose. We deny the petition.

In doing so we feel constrained to comment on the tone of Intervenor-Respondent's petition and to suggest that counsel who drafted it have cause to ponder their choice of words. The petition is cast almost entirely in terms of a personalized attack on the writer of the opinion, ignoring the fact that the court was *unanimous* and that the decision and opinion reflected the views of all three judges. In one paragraph, for example, it is asserted that the writer's "decision reflects antipathy toward the ICC," and that "[t]o cure what at most may be an inartistically written decision" the applicant on remand will be subject to an "unruly proceeding at which it will be the target for further character assassination." Intervenor-Respondent's Petition for Rehearing at 13-14. More could be quoted, but these excerpts give flavor enough.

We find such language repugnant to an atmosphere of decorum and civility in the appellate process. It would not be acceptable in referring to the brief of opposing counsel, much less to the opinion of a unanimous court. It is not only ill-mannered, it is ineffective.

In this case, we considered directing the Clerk to return this petition, but since from time to time there have been others couched in tones similar, we thought it more effective to state the court's reaction to this one and to reserve summary rejection for the next (if any) such petition filed.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981
No. 80-1713
ARGUED 10-16-81
FILED MAY 14, 1982

TRAILWAYS, INC.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

GREYHOUND LINES, INC., NATIONAL TRAILWAYS BUS SYSTEM,
Intervenors

Before: ROBINSON, *Chief Judge*, WRIGHT, TAMM, MACKINNON, ROBB, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG and BORK, *Circuit Judges*.

ORDER

Intervenor's suggestion for rehearing *en banc* has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam
FOR THE COURT:

George A. Fisher,
Clerk

BY: Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981
No. 80-1713
ARGUED: 10-16-81
FILED JUN. 7, 1982

TRAILWAYS, INC., et al.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

GREYHOUND LINES, INC., NATIONAL TRAILWAYS BUS SYSTEM,
Intervenors

Before: ROBINSON, *Chief Judge*, WILKEY and WALD, *Circuit Judges*

ORDER

On consideration of respondent's petition for rehearing, filed April 30, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam
FOR THE COURT:
George A. Fisher,
Clerk

BY: Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1981
No. 80-1713
ARGUED: 10-16-81
FILED JUN 7 1982

TRAILWAYS, INC., et al.,
Petitioners

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents

GREYHOUND LINES, INC., NATIONAL TRAILWAYS BUS SYSTEM,
Intervenors

Before: ROBINSON, *Chief Judge*, WRIGHT, TAMM, MACKINNON, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG and BORK, *Circuit Judges*

ORDER

Respondent's suggestion for rehearing *en banc* has been circulated to the full Court. A majority of the Court has not voted in favor of the suggestion. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam
FOR THE COURT:
George A. Fisher,
Clerk

BY: Robert A. Bonner
Chief Deputy Clerk

Circuit Judges MacKinnon and Bork would grant the suggestion for rehearing *en banc*.

SERVICE DATE JUN 17 1980

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INTERSTATE COMMERCE COMMISSION
DECISION
No. MC-1515 (Sub-No. 255)F
GREYHOUND LINES, INC., EXTENSION—LITTLE ROCK, AR (Phoenix, AZ)
Decided: June 4, 1980

We have considered the record in this proceeding, and:

(1) Petition of Trailways, Inc., protestant, filed March 10, 1980, for reconsideration embracing a petition for waiver of page limitation.

(2) Motion of applicant, filed March 31, 1980, to strike petition of protestant.

(3) Reply of applicant, filed March 31, 1980 to the petition of Trailways, embracing a petition for waiver of page limitation.

(4) Tendered supplement to petition of Trailways, Inc., protestant, submitted for filing May 1, 1980, embracing asserted new evidence.[1]

Both the petition and the reply exceed 30 pages in violation of rule 97(b)(3) of the Commission's Rules of Practice (49 C.F.R. §1100.97(b)(3)). In order to consider the merits of the petitions, and because neither party has objected to the waiver, the petitions will be received.

Applicant moves to strike protestant's petition for reconsideration for failure to comply with rules 4(d) and 97(b)(2) of the Commission's Rules of Practice, (49 C.F.R. §§1100.4(d) and 1100.97(b)(2)), regarding objectionable matter and identification of grounds for exceptions, respectively. The Commission's

[1] Greyhound Lines, Inc., filed a motion to strike this petition. In light of our action here, that motion is moot.

Rules are meant to be interpreted liberally; applicant's motion is denied.

By decision of January 18, 1980, the Commission, Review Board Number 3, granted the applicant authority to conduct operations substantially as sought in the original application.

Trailways requests the Commission to review pleadings which it filed in Ex Parte No. MC-133, *Petition for Rulemaking on Entry Flexibility for Regular Route Passenger Carriers*, which provide an analysis of competition in, and the structure of, the intercity bus industry. Further, Trailways requests that this application be considered along with five other pending applications filed by Greyhound, as evidence of applicant's continuing movement toward monopolization of the industry by selectively negating or neutralizing competitive advantages held by petitioner, its largest rival.

While we may take official notice of other Commission proceedings and the findings therein, we may not give consideration to evidence contained in the records in those proceedings; see *Coastal Tank Lines, Inc., Ext—W. Va.*, 108 M.C.C. 190, 195 (1968). Accordingly, petitioner's request for official notice must be denied. Petitioner has failed to tender other evidence, in exhibit form and in conformity with rule 80 of the Commission's Rules of Practice, (49 C.F.R. §1100.80). Nor does consolidated disposition of these proceedings appear warranted or in the public interest.

In a substantive vein, Trailways claims on petition that the board incorrectly characterized its evidence concerning the potential impact of a grant. It also asserts that the impact of diversion on its systemwide operating revenues was not recognized.

The decision under review reports that ticket sales at Little Rock during the period from July 11 to July 20, 1979 generated $417,367. This amount should be $17,367. Trailways claims that the total revenue subject to diversion is this figure annualized, or approximately $633,000. It is not clear whether the review board accepted this representation, or agreed with

applicant that petitioner's data exaggerate the potential harm. There is, however, no basis on which to find that it improperly weighed Trailway's evidence based on its improper statement of petitioner's testimony, for the misstatement would only serve to strengthen Trailway's case by overstating its study period revenues subject to diversion. Also regarding revenues subject to diversion, Trailways filed a supplement to its petition, requesting that the Commission accept statistical data filed by Greyhound on or about March 31, 1980, which, according to Trailways, shows that Trailways may have underestimated its potential revenue diversion at Little Rock. We do not feel the slight increase in potential diversion which this matter supports would warrant reopening of the record or alter the final result. Otherwise, petitioner's representations concerning potential systemwide harm may not be considered, for this issue was not raised prior to the time this proceeding reached the petition stage. No basis exists for reopening or modifying the prior decision.

It is ordered:

Rule 97(b)(3) of the General Rules of Practice is waived as to both the petition and the reply.

The motion in (2) is denied.

The tendered supplement to the petition is rejected.

The petition is denied because the findings of Review Board Number 3, as modified above, are in accordance with the evidence and the applicable law, and no sufficient or proper cause appears for reopening the proceeding to receive additional evidence.

If applicant does not comply with the appropriate requirements set forth in the Code of Federal Regulations (49 CFR 1043, 1044, and 1306) within 90 days after the date of service of this decision, the grant of authority will be void, and the application will stand denied. Applicant must certify in writing that rates are on file with the Commission (identifying the publication) to cover the authority granted in this proceeding.

This decision will be effective 15 days from its date of service.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Clapp, Gresham, and Trantum.

JAMES H. BAYNE
Acting Secretary

(SEAL)

NOTICE: This proceeding is now administratively final within the meaning of 49 CFR §1101.2(f) of the Commission's regulations; and, in accordance with the provisions of Section 558(c) of the Administrative Procedure Act, any corresponding temporary authority expires and operations thereunder must cease upon the effective date of this decision, except that to the extent permanent authority is granted in this proceeding (and if partial, only to that extent) the corresponding temporary authority or portion thereof will continue in effect until a certificate or permit is issued and becomes effective. The filing of any further pleadings in this matter will not stay the expiration of the temporary authority related to the denied portion of the sought permanent authority.

SERVICE DATE FEB 8 1980

RB 3
VS

INTERSTATE COMMERCE COMMISSION
DECISION
No. MC-1515 (Sub-No. 255) F
GREYHOUND LINES, INC., EXTENSION—
LITTLE ROCK, AR (Phoenix, AR)
Decided: January 18, 1980.

Applicant seeks a certificate of public convenience and necessity as a common carrier by motor vehicle authorizing the operations described in the appendix. The evidence has been considered under the modified procedure. The application is opposed by Trailways, Inc., on behalf of its wholly owned subsidiary, Arkansas Motor Coaches, Ltd. Applicant filed a rebuttal statement.

Preliminary Matter

Protestant moves to strike certain portions of applicant's verified statement that refer to applicant's operations pursuant to temporary authority granted in General Temporary Order No. 18 in Ex Parte No. MC-126, served July 12, 1979. Protestant contends that by its terms, Ex Parte No. MC-126 specifically prohibits reliance on evidence of operations in applications of this nature conducted pursuant to the authorized temporary service and that all references to that authority by applicant must be stricken as improper. Contrary to protestant's assertions, that decision reflects the proposition long held by the Commission that permanent authority will not be granted on the basis of past operations under temporary authority. While it is well settled that operations under temporary authority alone are insufficient to form a basis for a grant of authority, they are useful, when there is other probative evidence, in determining a carrier's fitness and ability to provide the service, as an indication of the volume of traffic involved,

and to indicate the effect of a grant of authority on the existing carriers. See *Roadway Exp., Inc., Ext.—Birmingham, Dallas, Houston*, 82 M.C.C. 689, 703 (1960). Inasmuch as a grant of authority in this proceeding is not based on consideration of the evidence of applicant's temporary operations and inasmuch as the evidence of such operations is not irrelevant, immaterial, and lacking some probative value, the striking of the assailed references to applicant's temporary operations is not warranted.

Pertinent Facts

Applicant is a motor common carrier of passengers over regular routes essentially between all points in the United States. As pertinent, Greyhound is authorized in Sub-No. 71 to conduct operations between Memphis, TN, and Texarkana, TX, over a network of regular routes across Arkansas which includes service to Little Rock, AR, in addition to other points. Applicant also transports passengers, as well as express and newspapers, pursuant to authority held in Deviation No. 735 between Memphis and Texarkana directly over Interstate Highways 30 and 40, passing through Little Rock, but authorizing no service to intermediate points. Finally, applicant conducted temporary operations under General Temporary Order No. 18 in Ex Parte No. MC-126 which authorized service identical to that sought in this proceeding, but which expired September 25, 1979.

For persons desiring use of Greyhound's services to or from Little Rock in conjunction with service at either Memphis or Texarkana, the largest cities to the East and West, respectively, of Little Rock, Greyhound offers, first, four daily round trips between Texarkana and Memphis. Passengers must make connection at Pine Bluff, AR, roughly 35 miles south of Little Rock, requiring a change of buses for service to Little Rock. Also over the local service route, Greyhound offers four round-trips daily between Little Rock and Memphis which do not require making connection with other buses, but travel over a similarly circuitous route. Applicant also provides two daily

roundtrips between Texarkana and Memphis over the more direct route on Interstate Highways 30 and 40 pursuant to its deviation authority which does not permit stopping at Little Rock. It conducted two similar trips under its temporary authority, which included stops at Little Rock.

Greyhound submits figures reflecting a study of its passenger traffic and express traffic between Little Rock, on the one hand, and, on the other, Memphis, Texarkana, and points beyond during November, 1978. For the entire month, it transported 789 passengers which generated sales revenues of $30,679. Express handled for the period of November 1-15 totaled 1,329 shipments for $13,535 in revenue.

In support of its application, Greyhound contends that the proposed service is not new, but that instead it constitutes an improvement in its already existing service between the involved points. Rather than seeking additional authority, applicant asserts that it seeks to serve Little Rock, which it now serves via a circuitous routing system between Memphis and Texarkana, in conjunction with the more expeditious service it now provides pursuant to deviation authority between those two points over the interstate highway system passing through Little Rock. Greyhound argues that by providing a fast, direct, frequent bus service between Little Rock, on the one hand, and, on the other, Memphis and Texarkana, it is offering a more convenient service for its existing passengers and shippers already using its services, and providing the most attractive alternative service for car users which are seeking alternative transportation modes in attempts to conserve fuel. Greyhound argues that the figures demonstrate that it is already a significant competitor for Little Rock traffic and that a grant therefore will not result in any adverse impact on existing carriers.

The application is supported by 45 public witnesses. Of this total, 31 are prospective passengers, most of whom are located in the Little Rock area. Nearly all of them have used applicant's services between the considered points, including the temporary service, and collectively they seek to be able to rely permanently on the more convenient direct service which applicant proposes.

A few use their automobiles for trips between these points and they intend to replace reliance on their cars with applicant's service upon a grant because of the current gasoline crisis. Only three now use protestant Arkansas' service.

As for the remaining 14 witnesses, they submit statements with respect to the proposed express service. Collectively, these witnesses ship a variety of parts and supplies, including automobile and tractor supplies and construction materials, between the considered points. These shippers, nine of which are located in Texarkana and four, in Little Rock, require an express delivery service to move emergency replacement parts and other small shipments between Little Rock, on the one hand, and, on the other Memphis, Texarkana, and points beyond, to their facilities or customers. While a few of the shippers now use protestant as well as other carriers not parties in this proceeding, they uniformly express dissatisfaction with these services and complain of delays in delivery of their products. The remainder rely on applicant's services. Generally, all of the witnesses state that the proposed operation over the interstate highways would be a great improvement over applicant's longer local service and would better suit their transportation needs.

Protestant Trailways opposes the application on behalf of Arkansas Motor Coaches, Ltd., Inc., a wholly owned subsidiary of Trailways, which is authorized, as pertinent, to transport passengers and their baggage, and express, newspapers, and mail in the same vehicle with passengers, between Memphis, TN, and Texarkana, TX, over a series of regular routes excluding Interstate Highways 30 and 40, serving all intermediate points including Little Rock. Arkansas also holds deviation authority to operate over Interstate Highways 30 and 40; specifically in Deviation No. 16 between Texarkana, TX, and Hope, AR; in Deviation No. 17 between Prescott, AR, and Benton, AR; and Deviation No. 15 between North Little Rock, AR, and a junction 4 miles west of West Memphis, AR. It operates six round-trip schedules daily between Memphis and Texarkana which serve the intermediate point of Little Rock, four of which stop at additional intermediate points. Service is conducted at various times throughout the night and day.

Arkansas fears the diversion of its existing traffic upon a grant. It submits a traffic study reflecting the period from July 11 to July 20, 1979, showing the sale of 501 passenger tickets from Little Rock to either Memphis or Texarkana and points beyond, which generated revenues of $417,367. Protestant contends that a grant will result in service duplicating its own and that it stands to lose all its existing traffic to applicant. A financial statement for 1978 indicates that while Arkansas' net income totalled $218,723, total operating revenues were $2.3 million. Protestant argues that the proposed service represents such an improvement over applicant's existing service as to constitute a new service, and that an additional grant on behalf of applicant, already the largest passenger carrier, will result in destructive competition.

In its rebuttal statement, Greyhound asserts that protestant's traffic study represents a period in July when traffic is heaviest and does not reflect revenues which would be potentially divertible from Arkansas' total traffic. The study not only reflects ticket sales at Little Rock to Memphis and Texarkana, but also to points beyond. Applicant points out that Arkansas' operations are limited and that the entire sales price of the ticket was used without prorating that portion of the trip handled by Arkansas.

Discussion and Conclusions

We believe that applicant has established that the public convenience and necessity require the services for which authority is sought. A substantial number of public witnesses support these services. Nearly all of the prospective passengers rely on applicant's existing operations, which are either over circuitous local service routes or over the involved interstate routes under a temporary authority duplicating this application, for trips between Little Rock, on the one hand, and Memphis, Texarkana, and points beyond. While many of them have used applicant's services for years and express general satisfaction with the service, the passengers uniformly seek to rely perma-

nently on the more expeditious, direct service over the four-lane through highways. With the availability of a more convenient service, the witnesses intend to utilize applicant more frequently. The witnesses require applicant's services for a variety of reasons, including regular travel to and from school, business and personal trips, and to replace automobile usage in view of the gasoline shortage.

Applicant's existing Little Rock service requires connections at Pine Bluff, AR, some 35 miles south of Little Rock, for trips between Little Rock and Texarkana, while service between Little Rock and Memphis involves an equally circuitous route. Thus, although the more direct service proposed here will result in a reduction in miles in applicant's service, applicant is not proposing a new service. Rather, a grant will enable applicant to provide its Little Rock passengers a more efficient, economical, and expedient service at and between points already served by it, avoiding the necessity of requiring its Little Rock passengers to make connections with another bus and to travel over a more circuitous route.

The transportation of express and newspapers in the same vehicle with passengers has customarily been authorized as incidental service which is dependent upon the primary establishment of a need for passenger service. Several witnesses have relied on applicant's existing service in transporting their freight between the described points and have established a need for the more convenient service proposed here. Accordingly, we conclude that such authority should be included in the grant of authority in the appendix authorized in this proceeding.

While protestant Trailways' subsidiary, Arkansas, conducts regular service between Memphis and Texarkana over a network of routes, including portions of Interstate Highways 30 and 40, with intermediate stops at Little Rock, it is unable to provide the entire proposed service. We note that passenger and express traffic between the named points constitutes a considerable part of Arkansas' operations. Nevertheless, we are unable to conclude that the potential diversion of this traffic which a grant might precipitate would materially adversely

affect either Arkansas or its parent, Trailways. The likelihood of substantial diversion of protestant's traffic is remote. Applicant is already a considerable competitive factor in the involved market. It transports a large volume of passengers and express between the named points. The proposed service represents an improvement in its existing service which is needed by its existing customers and which is equally attractive to other travelers now relying on private automobiles, trains, and air travel. A number of witnesses require an expeditious service between the named points, which are major cities, to reduce use of their automobile and conserve fuel. On balance, the benefits to the public from applicant's more expeditious service upon a grant far outweigh any detriment to existing carriers shown by this record.

We find:

The present and future public convenience and necessity require operation by applicant, performing the service described in the appendix. Applicant is fit, willing, and able properly to perform the granted service and to conform to the requirements of Title 49, Subtitle IV, U.S. Code, and the Commission's regulations. This action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

The motion of protestant Trailways, Inc., to strike certain portions of applicant's statement is denied.

The application is granted to the extent set forth in the appendix.

Operations may begin only following the service of a *certificate* which will be issued if applicant complies with the following requirements set forth in the Code of Federal Regulations: insurance (49 CFR 1043), designation of process agent (49 CFR 1044), and tariffs (49 CFR 1310). Applicant must certify in writing that rates are on file with the Commission

(identifying the publication) to cover the authority granted in this proceeding.

Compliance with these requirements must be made within 90 days after the date of service of this decision or the grant of authority shall be void.

By the Commission, Review Board Number 3, Members Parker, Fortier, and Hill (Board Member Parker not participating).

AGATHA L. MERGENOVICH
Secretary.

(SEAL)

APPENDIX:

Authority to conduct the following operations will be issued in an appropriate document. This decision does not constitute authority to operate.

To operate as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over regular routes, transporting *passengers and their baggage, and express and newspapers*, in the same vehicle with passengers, between Texarkana, TX, and Memphis, TN, from Texarkana, over Interstate Hwy 30 to Little Rock, AR, then over Interstate Hwy 40 to Memphis, TN, and return over the same route, serving the intermediate point of Little Rock, AR.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 81-4013
Summary Calendar

TRAILWAYS, INC., et al.,

Petitioners,

versus

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA

Respondents.

Petition for Review of an Order of
the Interstate Commerce Commission

(August 24, 1981)

Before: GEE, RANDALL and TATE, *Circuit Judges.*

Per Curiam:

Trailways[1] petitions to review an order of the Interstate Commerce Commission that granted an application by Greyhound to carry passengers and freight between Lincoln and Grand Island, Nebraska over Interstate Highway 80. (Previously, Greyhound had authority to do so, but over a more circuitous route.) Trailways, whose subsidiary held the only pre-existing certificate for direct service between these cities, opposed Greyhound's application on behalf of its entire nationwide system (of which this route forms a part), as did the subsidiary itself.

As a basis for reversal, Trailways principally[2] argues that the ICC erred in failing to consider evidence and to make findings with regard to the potential harm to be caused to Trailways on a systemwide (as opposed to purely local) level by the grant of the Greyhound application.

The agency's determinations principally concerned the effect of the grant of the Lincoln-Grand Island certificate to Grey-

hound upon the Trailways' subsidiary ("American") serving those points. The only direct evidence of economic harm introduced by Trailways concerned that to American.

In complaining of the revenue loss to the Trailways *system* (in addition to that to American), the Trailways vice president relied only upon American's loss. Appendix, 40-42. The bulk of this witness's statement was devoted to the effect of the Greyhound grant only upon the Trailways subsidiary. Aside from a cursory conclusory statement of potential adverse effect upon the other protestants,[3] the sole reference in the witness's statement to the systemwide effect of the Greyhound certificate was in his concluding paragraphs, which emphasized, by way of general argument without particularized support, that Greyhound was the dominant carrier in the field and that, "[a]lthough approval of this application alone will probably not cause the downfall of the entire Trailways system, approval will harm the Trailways system," App. 47, and that the issue "involves an application by the largest bus company in the world over the route of a financially weak, but essential, member of the Trailways system, the only real competitor to Greyhound," App. 46.

On the record made before it, the board took note of the systemwide issue. It noted that American alleged the application's grant would have "a disastrous impact on its operations between the involved points and adversely affect other protestants which operate through bus services utilizing bus pools with [the subsidiary]." App. 61. In rejecting this argument, the board stated: "The economic data presented by protestant are not sufficiently persuasive to enable us to determine that a grant would have a substantial material impact upon protestant's operations and its ability to serve the public." *Id.* For reasons to be noted, the board's opinion and findings disclose that it adequately considered and made findings on the systemwide issue, *as raised by Trailways in the hearing before the board.*

In its petition to the ICC for administrative review, Trailways devoted a substantial portion of its complaint to the argument

that the board had taken a "microscopic" view and had not considered the impact of the certificate grant on bus traffic in the Chicago-California corridor served by the Trailways system. App. 69-77. Even there, however, Trailways only complains of the $150,000-$250,000 loss in passenger revenues with origination or destination in the two-city area involved, App. 73-74, apparently based upon the estimated revenue loss to its Lincoln-Grand Island subsidiary (American), App. 73 at note**, the only revenue loss as to which economic data was presented by Trailways. A principal thrust of the petition was that the Commission should consider the present Greyhound application in conjunction with the other Greyhound applications that allegedly would cumulatively have substantial impact on the Trailways systemwide operations in the Chicago-California corridor.

In its response to Trailways' petition, Greyhound correctly noted that the issue as to the Chicago-California central corridor traffic was not presented in the proceedings and that the evidence presented concerned only traffic to and from Lincoln from the West. App. 101. On ICC review, the Commission noted Trailways argument that the board had refused to recognize the present application in the large context of systemwide impact. Tr. 145. The Commission further noted that, at Trailways' request, the Commission had further already consolidated the Greyhound applications, but that consolidation of the present application was denied because of the limited and purely local nature of the authority sought. The board then denied the petition for review because the board's findings were in accordance with the evidence before the board and the applicable law.

To reiterate, Trailways' principal complaint is that the Commission failed to consider the harm to the Trailways systemwide operations that would likely result from a grant of Greyhound's application and to make specific findings with regard to that issue. However, as the record at the hearing shows, the only specific complaint of systemwide harm here made was that relative to the economic loss to be sustained by *American*, the Trailways subsidiary, if the presently-sought similar direct-

service authority were granted to Greyhound between the two cities served by American.

The issue as posed at the hearing thus concerned only the systemwide harm to be suffered through the economic harm to *American* through the grant to Greyhound of parallel authority to provide direct service to the two cities. Thus viewed, the board's reasons, which stated the contention as to systemwide effect on Trailways, stated adequate reasons for rejecting that contention: it found that the grant to Greyhound would not have a substantial material impact upon American, a finding supported by substantial evidence (see note 2).

Under the present circumstances, adequate compliance is shown with the requirement that the agency decision include "a statement of . . . findings and conclusions, and the reasons or basis therefor, on all the *material* issues of fact, law, or discretion presented *on the record*." Section 557(c)(A), Administrative Procedure Act, 5 U.S.C. 557(c)(A) (emphasis supplied). The decision makes findings sufficient to resolve the material issues presented at the hearing; when read as a whole, it discloses the essential basis for the Commission's judgment. The Commission is not required to make express findings on collateral contentions considered by it—only to make findings upon the material issues of fact, law, or discretion presented to it by the administrative proceedings. Minneapolis & St. Louis Ry. Co. v. United States, 361 U.S. 173, 193-94, 80 S.Ct. 229, 241 (1959). *See also* Immigration & Naturalization Service v. Bagamasbad, 429 U.S. 34, 97 S.Ct. 200 (1976).

The Commission's findings are supported by substantial evidence and not arbitrary, and its decision makes adequate findings on all material issues of fact, law, or discretion. Accordingly, we AFFIRM the decision of the Interstate Commerce Commission.

AFFIRMED.

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Footnotes appended.

FOOTNOTES

[1] As used in this opinion, "Trailways" refers to the Trailways system protestants: Trailways, Inc., its 14 wholly-owned bus subsidiaries, and some of the 42 independent bus carriers, who together provide nationwide service. One of the Trailways' subsidiaries, American Bus Lines, Inc. ("American"), was the protestant with (until the grant of the Greyhound application) exclusive authority to carry passengers directly between Lincoln and Grand Island, Nebraska.

[2] Trailways also contends that the ICC conclusion that the grant of authority would not have a material impact on the local Trailways subsidiary was arbitrary, irrational, and unsupported by substantial evidence. This contention is not substantial, under accepted principles of judicial review of such an agency determination.

Based upon evidence to such effect, the agency review board found a need for such additional direct service between Lincoln and Grand Island, and it concluded that the revenue loss to the Trailways' subsidiary ("American") serving those points (operating revenues of over thirty-seven million dollars, loss caused by diversion of traffic to Greyhound estimated by Trailways to be $168,000, later increased to $275,000) would not have a substantial material impact upon American's operations and its abilities to serve the public. On administrative review, the ICC adopted the Board's findings and conclusions. The agency determinations are supported by substantial evidence, not irrational or arbitrary, and are within the proper exercise of the agency's discretion. See, e.g., Miller Transporters, Inc. v. United States, 594 F.2d 463 (5th Cir. 1979).

[3] At App. 46:

Additionally, the grant of this application would adversely impact upon the other protestants in this proceeding, who operate in through bus service utilizing bus pools with American Buslines, serving thousands of points throughout the United States. Passenger and express revenues would be diverted from their operations if Greyhound were allowed to serve between the points involved in this application and the

hundreds of other nationwide points which Greyhound is currently authorized to serve, particularly in the western part of the United States.

[4] The word protestant as used in the singular, Trailways notes, implies that only the impact on the subsidiary was considered.

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INTERSTATE COMMERCE COMMISSION
DECISION
No. MC-1515 (Sub-No. 260)F
GREYHOUND LINES, INC., EXTENSION—LINCOLN, NEBRASKA (Phoenix, AZ)
Decided: December 10, 1980

We have considered the record in this proceeding, including an appeal of Trailways, Inc., a tendered supplement to the appeal by Trailways, applicant's reply and motion to strike the supplement and Trailways reply to the motion.

Protestant's tendered supplement to its appeal will be accepted since the additional evidence does not appear to be cumulative and the material was assertedly discovered by protestant after this appeal was filed. Accordingly, applicant's motion to strike will be denied.

Trailways petition and its carrier members statement alleges that the review board failed to recognize this case (a) in the large context of destroying competition in specific bus passenger markets and (b) as a further step "in a coordinated plan by Greyhound to cripple" the Trailways system, its closest rival. Trailways and its members request that this application be consolidated with five other Greyhound applications. Trailways contends that these applications evidence Greyhound's movement toward monopolization of the industry by selectively negating or neutralizing the few competitive advantages held by Trailways over Greyhound. The consolidation issue has already been addressed. By decision served November 24, 1980, the Commission in No. MC-1515 (Sub-No. 239) et al., *Greyhound Lines, Inc.* granted Trailways' motion for consolidation with respect to 4 of the 6 proceedings. The request for consol-

[1] This decision also permitted the National Trailways System to intervene in this proceeding.

idation of Sub-Nos. 255F and 260F was denied because of the nature of the authority sought and the fact that Sub-No. 255F is administratively final and Sub-No. 260 is pending administrative review.

It is ordered:

The tendered supplement to the petition of Trailways, Inc., is accepted for filing.

The motion to strike is denied.

The petition, as supplemented, is denied because the findings of Review Board Number 3 are in accordance with the evidence and the applicable law.

If applicant does not comply with the appropriate requirements set forth in the Code of Federal Regulations (49 CFR 1043, 1044, and 1307) within 90 days after the date of service of this decision, the grant of authority will be void, and the application will stand denied.

This decision will be effective 15 days from its date of service.

By the Commission, Division 2, Acting as an Appellate Division, Commissioners Trantum, Gresham, and Gaskins.

JAMES H. BAYNE
Acting Secretary

(SEAL)

NOTICE: This proceeding is now administratively final within the meaning of 49 CFR 1101.2(f) of the Commission's regulations; and, in accordance with the provisions of Section 558(c) of the Administrative Procedure Act, any corresponding temporary authority expires and operations thereunder must cease upon the effective date of this decision, except that to the extent permanent authority is granted in this proceeding (and if partial, only to that extent) the corresponding temporary authority or portion

thereof will continue in effect until a certificate or permit is issued and becomes effective. The filing of any further pleadings in this matter will not stay the expiration of the temporary authority related to the denied portion of the sought permanent authority.

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INTERSTATE COMMERCE COMMISSION
DECISION
No. MC-1515 (Sub-No. 239)*
GREYHOUND LINES, INC.
(Phoenix, AZ)
Decided November 20, 1980

We have considered the applications and the records in these proceedings, including:

(1) Motion of Trailways, Inc., filed May 30, 1980, to consolidate these six applications;

(2) Petition of Adirondack Transit Lines, Inc., et al. (23 carriers identified as the small carrier members of the National Trailways Bus System), filed June 6, 1980, for leave to intervene in these six proceedings;

(3) Tendered statement of position submitted by the carriers identified in (2), filed June 6, 1980;

(4) Petition of Office of Special Counsel, Interstate Commerce Commission, filed June 25, 1980, for leave to intervene in these six applications, and in support of the motion to consolidate;

(5) Petition of the United States Office of Consumer Affairs, filed June 27, 1980, for leave to intervene in these six applications, and in support of motion to consolidate;

(6) Reply by Greyhound Lines, Inc., applicant, filed July 15, 1980;

(7) Motion of Trailways, Inc., et al., filed July 29, 1980, to strike portions of (6). Greyhound replied.

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* This proceeding embraces No. MC-1515 (Sub-Nos. 241, 255F, 258F, 260F and 281F).

It is ordered:

The small carrier members of the National Trailways Bus System, the Office of Special Counsel, Interstate Commerce Commission, and the United States Office of Consumer Affairs are permitted to intervene in these proceedings and participate in all further proceedings. The statement of position of the small carrier members of the National Trailways Bus System is accepted for filing.

The motion to strike is denied.

The motion for consolidation is granted in part and denied in part.

Whether or not to consolidate different cases for hearing and consideration is a question concerning the most efficient disposition of the Commissioner's docket. It turns on a number of considerations, including the factual relationships between different cases, the commanality of the factual and legal issues involved, the timeliness of requests to consolidate, and the procedural stages of the different cases at the time consolidation is requested.

Parties usually file requests to consolidate proceedings before the submission of evidence in the proceedings. In this motion, however, Trailways asks consolidation of six Greyhound applications that are in various procedural stages before the Commission. For Example, in Sub-No. 281, hearings have not yet been held. By contrast, the proceeding in Sub-No. 255F is administratively final and is currently pending review in the United States Court of Appeals.

Four of the six applications involve requests for new operating routes. In the other two proceedings—Sub-Nos. 255F and 260F, Greyhound seeks unrestricted authority to serve intermediate points on routes over which it currently operates.

Trailways argues that the Greyhound applications are a concerted action aimed at altering the competitive structure of the motor bus industry in the United States. Consolidation of the four applications to serve new routes will allow the Com-

mission to consider fully Trailways' arguments and the alleged impact of these applications on the intercity bus industry. The proceedings in No. MC-1515 (Sub-Nos. 239, 241, 258F) are reopened for further hearing, on a consolidated record with the proceeding in No. MC-1515 (Sub-No. 281F), with respect to the issues of the structure of the national motor bus industry and Greyhound's dominance of that industry, the cumulative effect of these four applications on that industry and its competitive structure nationwide, the impact that a grant of these four applications would have on the traveling public, and such further matters as the hearing officer may deem appropriate. In all other respects, hearings in No. MC-1515 (Sub-No. 281F) will proceed independently.

The request for consolidation with respect to the proceedings in No. MC-1515 (Sub-Nos. 255F and 260F) is denied because these two applications simply seek authority to provide unrestricted service at named intermediate points on highways over which applicant already operates, and therefore involve factually different issues from the applications to serve entirely new routes. Moreover, the proceeding in Sub-No. 255F is administratively final, and the proceeding in Sub-No. 260F is pending an administrative appeal of an initial review board decision and is therefore near completion. The facts and procedural posture of these two proceedings distinguish them from the other four proceedings and warrant denial of the motion to consolidate them with the other four proceedings.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Clapp, Trantum, Alexis, and Gilliam.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

SERVICE DATE JUN 10 1982

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VS

INTERSTATE COMMERCE COMMISSION
DECISION
No. MC-1515 (Sub-No. 306)
GREYHOUND LINES, INC., EXTENSION—FT. COLLINS, CO (Phoenix, AZ)
Decided: June 2, 1982

Applicant seeks a certificate authorizing the operations described in the appendix. The evidence has been considered under the modified procedure. The application is opposed by Trailways, Inc.

Protestant filed a motion to stay, or, alternatively, to consolidate this proceeding with another action which has been remanded to the Commission for further consideration. Specifically, in *Trailways, Inc. v. Interstate Commerce Commission*, No. 80-1713, D.C. Cir., March 16, 1982, the Court vacated an order of the Commission which granted applicant new operating authority to serve Little Rock, AR, as an intermediate point on a deviation route served by the applicant between Texarkana, TX, and Memphis, TN. On remand, the Commission is to assess the structure of the bus market and to determine if there is any detriment to the public interest arising from the incremental impact on Trailways' competitive position by an award of the aforesaid authority. Trailways asserts that the instant application involves a factual situation, service to intermediate points on a deviation route between Denver, CO, and Laramie, WY, which is remarkably similar to that in the "Little Rock" case. Given the alleged similarity, protestant argues that either a stay or the consolidation of both proceedings is appropriate. Contrary to protestant's assertions, the impracticability and attendant delay of holding up this, or any other bus passenger case, until the pending matter is resolved, has not been shown to be warranted. Furthermore, the "Little Rock" case hereinabove referred to is being considered for an

appeal by the Commission and in that event, it would be highly unreasonable to join the instant proceeding with the first, subjecting both to the likelihood of a protracted delay. Accordingly, we conclude that the instant case can and, in fact, should be decided separately under the presently applicable Commission precedents in passenger cases. Protestant's alternative motions for a stay or consolidation of these proceedings are denied.

Next, in the event protestant's motions for a stay or consolidation were denied, it asked that this proceeding be set for oral hearing. However, because we do not find any material matters of fact to be in dispute, protestant's request is similarly denied.

Applicant is a nationwide passenger carrier. As pertinent, Greyhound currently holds deviation authority in MC-1515 (Deviation No. 737) to transport passengers and their baggage, and express and newspapers in the same vehicle, from Denver, CO, over Interstate Highway 25 to junction Colorado Highway 14, then over Colorado Highway 14 to junction U.S. Highway 287, then over U.S. Highway 287 to Laramie, WY, and return over the same route for operating convenience only. It seeks to convert this authority to certificated authority because of an existing demand for service to and from Ft. Collins, CO, over the Denver-Laramie route which, it submits, is not now being met by any single carrier. The subject deviation is supported by applicant's regular route authority as described in No. MC-1515 (Sub-No. 71) which reflects the following specified routes: (a) Between the Wyoming-Colorado State Line and Denver via U.S. Hwy 85 and certain unnumbered highways; (b) Between Cheyenne and the Wyoming-Colorado State Line via U.S. Hwy 85 and (c) Between Rock Springs and the Wyoming-Nebraska State Line, east of Pine Bluffs via U.S. Hwy 30/Interstate Hwy 80. Additionally, applicant provides service over U.S. Highway 87 Interstate 25 between Denver and Cheyenne as authorized by Deviation Route No. 212.

The application is supported by 15 public witnesses. Of this total, 9 represent prospective passengers, all of which are in the

Ft. Collins area. All cite the need for direct bus service between Ft. Collins and Laramie and seek to replace their dependence on private autos with applicant's proposed service. Some of these witnesses are familiar with Greyhound's services in other locations and desire the availability of that same quality service at Ft. Collins.

Next, the remaining 7 witnesses submit statements concerning the proposed express service. Collectively, these witnesses ship a variety of merchandise and parts and sewing machines and supplies between Ft. Collins and Laramie. These witnesses complain that because no direct bus service is available to them on the aforementioned route, they are forced to rely on unsatisfactory alternatives such as parcel delivery services, private carriage, or bulk freight lines. All agree that the proposed service would greatly assist them in meeting their transport needs.

In addition to the service need identified between Ft. Collins and Laramie, at least one passenger witness and one express package shipper define a similar need between the Ft. Collins and Denver area. It is not clear, however, that such movements would involve interstate service.

Protestant, through its wholly-owned subsidiary Denver Colorado Springs Pueblo Motor Way, Inc., holds regular route authority between Denver, CO and Cheyenne, WY, and thereby holds the exclusive authority to serve Ft. Collins, CO, the intermediate point which applicant seeks to serve through this proceeding. It serves Ft. Collins on schedules operating between Denver and points to the north by way of Cheyenne, WY, which is about 50 miles east of Laramie. It does not claim to provide service between Ft. Collins and Laramie. It submits a 10-day revenue study for passenger and package express sales at Ft. Collins which annualized represents earnings of nearly $73,566 and $99,364 respectively. Of this amount, it fears diversion by applicant of 50 percent.

Protestant argues that diversion of over $86,460 each year will have a substantial adverse effect on its operations. While its operating revenues for 1981 totalled nearly $300 million, it

experienced a net loss of about $3 million for the same period. It contends that this situation will only be further aggravated by the loss of its competitive advantage at Ft. Collins if applicant is awarded this authority.

In rebuttal, applicant stresses that it already operates between Denver and Laramie with a through service to and from points West by virtue of a deviation route between Denver and Laramie. It asserts that the proposed Ft. Collins-Laramie route presently does not have any bus service but represents a route over which Trailway's subsidiary, Denver Colorado Springs Pueblo Motor Way, Inc., abandoned service in 1978. Protestant's further disinterest in service to Laramie and other Wyoming points can be seen, according to applicant, from Trailways' abandonment of its operations over Interstate Highway 80, its former east-west route through Wyoming. Under this proposal, applicant seeks merely to open its doors for intermediate passengers on a route it already serves through deviation authority and a substantial portion of which Trailways, Inc. has abandoned.

Applicant has demonstrated that the present and future public convenience and necessity require authorization of its proposed operation. A representative number of public witnesses, both passengers and express shippers, have attested to a need for direct, regularly-scheduled bus service between Ft. Collins, CO, and Laramie, WY. As the passenger witnesses point out, applicant's service would fill this particular gap for the Ft. Collins community. Along with this need for passenger service, the incidental transport of express and newspapers will be included in the grant of authority as sought and requires no additional discussion or verification beyond its initial review in the supporting data.

We are unable to conclude that Trailways will be materially adversely affected by a grant of this authority. Inasmuch as Greyhound has presented convincing evidence that Trailways through its subsidiary is not and has not conducted operations over the Ft. Collins-Laramie Route for a number of years, we can conclude that to this extent it has effectively chosen to

eliminate its presence and interest in the involved marketplace. Next, we are unconvinced that the award of this authority will endanger most or all of Trailways' existing Ft. Collins traffic. The fact that now Ft. Collins customers will be able to choose between protestant's and applicant's services does not mean that protestant will be unsuccessful in retaining its customers through the setting of competitive rates and the continuation of quality service. Accordingly, we do not believe that Trailways has shown how approval of this application would impair its systemwide operations, which last year totalled approximately $300 million, to an extent contrary to the public interest. On balance, we believe that the advantages accruing to the public from the availability of applicant's proposed operation outweigh the potential adverse effects upon Trailways.

We find:

The present and future public convenience and necessity require operation by applicant performing the service described in the appendix. Applicant is fit, willing, and able properly to perform the granted service and to conform to statutory and administrative requirements. This action will not significantly affect either the quality of the human environment or conservation of energy resources. An appropriate certificate should be granted.

It is ordered:

The motions for stay or consolidation are denied.

The application is granted to the extent set forth in the appendix. Operations may begin only following the service of a *certificate* and upon compliance with the following requirements set forth in the Code of Federal Regulations: insurance (49 CFR 1043), designation of process agent (49 CFR 1044), and tariffs (49 CFR 1306).

By the Commission, Review Board Number 1, Members Parker, Chandler, and Fortier.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

44 Fed. Reg. 60296
(October 19, 1979)

49 CFR Ch. X
[Ex Parte No. MC 121]

Policy Statement on Motor Carrier Regulation

AGENCY: Interstate Commerce Commission.

ACTION: Policy statement.

SUMMARY: The Commission adopts a policy statement describing its standards for deciding applications seeking motor carrier authority. Where applicants for authority show that the service proposed is responsive to a useful public purpose, and that they are fit to perform that service, the Commission will grant the application unless those opposing it demonstrate that a grant of authority would endanger their operations, contrary to the public interest.

EFFECTIVE DATE: November 19, 1979.

FOR FURTHER INFORMATION CONTACT: Donald J. Shaw, Jr. (202) 275–7292.

SUPPLEMENTARY INFORMATION: We instituted this proceeding on December 5, 1978, by the publication of a notice in the **Federal Register** (43 FR 56979) in which we announced that we were considering adoption of a policy statement which would articulate, and if necessary modify, the criteria used in deciding cases involving motor carrier entry and acquisition. In light of the maturity of the motor carrier industry and changing economic conditions, we stated that, in carrying out regulatory responsibilities in the motor carrier area, more emphasis would be given to the benefits of healthy competition than to the protection of existing carriers.

To accomplish this goal in common carrier proceedings, we proposed to alter the three-part test first established in *Pan-American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936). These criteria are:

> * * * [W]hether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

We proposed eliminating the second part of the test, which concerns existing carriers' ability to meet the demonstrated public purpose as well as applicant. We announced that, in evaluating motor common carrier application, we would follow these standards:

> (1) An applicant must demonstrate that the service proposed will serve a useful public purpose, responsive to a public demand or need; and
>
> (2) The Commission will grant common carrier authority commensurate with the demonstrated need unless it is established by those opposing the application that the entry of a new carrier into the field would endanger or impair the operations of existing common carriers contrary to the public interest.

Our proposed standard for evaluating contract carrier applications will be described below.

We also stated that we were considering formulating new rules relating to the issuance of emergency temporary authority and new policy guidelines for handling applications for the merger, acquisition, and consolidation of motor carriers.

Preliminary Matters

Since this proceeding was instituted, we have determined that it was necessary to institute a rulemaking proceeding to formulate new rules pertaining to emergency temporary authority. One proposal in that area is now pending in Ex Parte No. MC–64 (Sub-No. 2), *Special Temporary Authority Proce-*

dures, published in the **Federal Register** on March 20, 1979 (44 FR 16996). Due to the complex issues involved in the establishment of new policies and guidelines in the area of motor finance transactions, we now believe that those issues will require separate consideration. We have, therefore, instituted Ex Parte No. 55 (Sub-No. 38), *Antitrust and Competition Factors in Motor Carrier Finance Cases*, (44 FR 21953).

The motor common carriers of passengers argue that their situation is different from that of motor carriers of property and that a different policy is required for them. Applicants for common carrier authority to transport both passengers and property must bear the burden of proving public convenience and necessity. The support normally relied upon by these two kinds of applicants differs. Property carriers can usually rely upon support from repetitive shippers, often with professionally staffed traffic departments. Passenger carriers, on the other hand, are more likely to serve the occasional user—persons who take intercity bus trips or who charter buses relatively infrequently—whose testimony is harder to obtain and who cannot usually be as firm in describing future service needs. Thus, passenger and most property carriers face different problems in pursuing an application for operating authority. However, it does not necessarily follow that the policies we apply in evaluating the necessarily different kinds of evidence that might be introduced in different kinds of proceedings should themselves be different. The *Pan American* case itself, after all, was a passenger application, and the standards developed there have worked well in evaluating property carrier applications. We believe that we can develop a statement on entry policy that will be applicable both to property and passenger carriers.

Western Pacific Transport Company, a motor common carrier that is a wholly-owned subsidiary of the Western Pacific Railroad, is concerned about Commission policy which requires rail-affiliated motor carriers to show "special circumstances" over and above the normal showing of public convenience and necessity before they can obtain unrestricted motor carrier authority. It requests clarification of that policy here. Any

change in the "special circumstances" policy would have a significant impact on the rail and motor carrier industries. Since that issue is beyond the scope of this proceeding, we will not change our policy in that area here. It will be considered in Ex Parte No. 230 (Sub-No. 5), *Improvement of TOFC/COFC Regulation*, in which an advance notice of proposed rulemaking was issued August 21, 1979 (44 FR 49279).

The Comments

Seventy-one initial statements were submitted in response to our proposed policy statement. Thirty-seven separate comments were submitted by individual motor carriers or groups of motor carriers. Those comments are the views of approximately 175 regulated motor carriers, representing almost all the segments of the motor carrier in industry. They include both common and contract carriers; established carriers; new entrants; regular-route, general commodities carriers; specialized, irregular-route carriers; and passenger carriers. Six separate comments were submitted by various motor carrier associations: The American Trucking Associations, Inc., on behalf of itself and four specified member conferences; The Common Carrier Conference—Irregular Route of the American Trucking Associations, Inc.; The Regular Common Carrier Conference of The American Trucking Associations, Inc.; The Contract Carrier Conference, Inc.; The Oil Field Haulers Association, Inc.; and National Automobile Transporters Association.

Six Federal agencies—the Department of Transportation, the Department of Justice, the Federal Trade Commission, the General Services Administration, the Council on Wage and Price Stability, and the Department of the Army—and the States of New Jersey, Utah, and Illinois submitted comments. The views of the shipping public were represented by comments from a total of 13 manufacturing companies, trade associations, and shipping groups, such as the National Industrial Traffic League, National Small Shipments Traffic Conference, Drug and Toilet Preparation Traffic Conference, and American Paper Institute, Inc. Statements were also filed by the Motor Carrier Lawyers Association; The International Brotherhood of Team-

sters, Chauffeurs, Warehousemen & Helpers of America; Act, Inc.; and two individuals, one a registered ICC practitioner and the other a property and casualty underwriter. We appreciate the time and effort expended by these participants to inform us of their views with respect to the proposed policy statement.

The comments cover the entire spectrum of positions on the subject. The lines are very sharply drawn between the motor carrier industry and the Federal agencies. The regulated carriers and their trade associations (except the Contract Carrier Conference, Inc.) generally oppose adoption of the proposed policy statement and many of the current steps that this Commission has taken to change motor carrier regulation. Some argue that the regulatory changes which the Commission proposes here go to the basic purposes of the statutory scheme itself, that they cannot lawfully be made administratively, and that they would require statutory change. Some point to chaotic conditions which existed prior to regulation and predict that any further loosening of entry controls will destroy the present stability and prosperity of the trucking industry. They do not, however, claim that the industry is comparable to that which existed in 1935. Some point out that not all trucking companies are large and enormously profitable, but none has argued convincingly that the regulated segment of the industry, taken as a whole, is anything but financially healthy.

The Federal agencies applaud the proposed policy change and urge this Commission to go even further to institute an open-entry policy. They rely largely on the application of economic theory, and cite the opinions of professional economists to the effect that the motor carrier industry is naturally competitive, and that freer entry will result in lower prices with no harmful reduction in service quality. One of the government parties—the Federal Trade Commission—in support of its argument that the industry, while it may have needed regulatory protection in 1935 does not need it today, has provided comparisons between the industry as it was then and as it is now.

The views expressed by shipper interests are somewhat varied, but shippers generally take a middle position. They favor

increased competition, and they also commend the Commission on its recent actions regarding regulatory reform of the motor carrier industry. Some, however, fear that adoption of this proposal may lead to completely open entry into motor transportation, which they believe might adversely affect the shipping public. Those same respondents favor entry control to guard against overcapacity, and they support continued regulation of such matters as financial responsibility and adequate insurance as necessary to protect the public. Several shippers favor total open entry.

The State agencies are primarily concerned with local issues. The Illinois Department of Revenue believes that the proposed policy could hinder its ability to collect State motor fuel tax from interstate carriers. The New Jersey Department of Transportation is concerned about the effect of the policy on interstate commuter bus operations. The Utah Motor Carrier Committee of the Utah Department of Transportation fears that adoption of the proposed policy statement may have an adverse impact on motor carrier service to small Utah communities.

Motor Carrier Entry Policy

The primary purpose of this proceeding is to appraise our policy relating to motor carrier entry control and to articulate a statement pertaining to the role of competition in applications for motor carrier authority. We are mindful that in *Trans-American Van Service, Inc.* v. *United States*, 421 F. Supp. 308 (N.D. TX, 1969), and *P. C. White Truck Line, Inc.* v. *ICC*, 551 F. 2d 1326 (DC Cir. 1977), the Commission was required to consider "* * * the contribution that increased competition might make to the public weal." *P. C. White, Supra*, 551 F. 2d at 1329. In instituting this proceeding, we suggested that elimination of the second *Pan-American* criterion regarding consideration of the adequacy of existing service might be the proper course to follow to give competition adequate consideration. We noted too, that we believed that in the past the Commission might have relied too heavily on adequacy of existing service, thus impeding the growth of beneficial competition.

The need for Federal regulation of the motor carrier industry followed the Supreme Court's decision in the landmark cases of *Buck* v. *Kuykendall*, 267 U.S. 307 (1925), and *Bush Co.* v. *Maloy*, 267 U.S. 317 (1925). There, the Court declared that it was unconstitutional for States to establish any entry control laws or regulations for interstate motor carriers, because the laws or regulations interfered with the free flow of interstate commerce. For approximately 10 years, Congress debated and considered legislation to create a regulatory system intended to support a coordinated nationwide transportation system involving motor carriers and other modes of transportation.

The culmination of this study and debate was the Motor Carrier Act of 1935, which contained a franchise system modeled after the regulatory programs adopted by a number of States. Included in the 1935 Act was a policy statement which was incorporated into the national transportation policy created by the Transportation Act of 1940. We still follow that policy today, see 49 U.S.C. 10101. That policy statement and the legislative history of the Motor Carrier Act of 1935, see 79 Cong. Rec., 12204-12237 (1935), demonstrate that two of Congress' primary goals were to ensure that the public had safe, efficient, and economic transportation services available and to stabilize the motor carrier industry so it could grow and develop. See *Regulation of Transportation Agencies*, S. Doc. No. 152, 73d Cong., 2nd Sess. (1935).

Congress intended the legislation to protect the interests of many different segments of the public, not just the interstate motor carrier industry. It sought to protect shippers from competitors within their own industries that were willing to make use of carriers engaging in discriminatory and unfair practices to obtain lower rates and other concessions; the general public from unsafe and irresponsible operators; and the railroads regulated by the Federal Government and intrastate carriers regulated by individual States from unfair competition by unregulated interstate carriers. Competition, especially competition between the different modes of transportation was to continue to play an important role in the national transportation system. However, competition was to be held within

reasonable limits and kept from becoming destructive and wasteful.

The legislation included an entry control system designed to guard against congestion and oversupply of transportation. However, there was never any intention to create monopoly situations. As was stated by a proponent of the legislation:

> There is nothing in the bill to prohibit the Commission from granting two or more certificates over the same route and there are many operators competing over the same route now that will receive certificates under the grandfather clause as a matter of course. The effect of such a provision is to place the authority in the hands of the Commission, a Government body, to determine whenever public convenience and necessity require additional operations on the public highway. 79 Cong. Rec., 12206 (1935).

The statute required new applicants to meet certain criteria before a certificate or permit could be granted. In deciding applications for common carrier authority, the Commission is required to find whether the present or future public convenience and necessity require the service proposed. See 49 U.S.C. 10922. In a contract carrier application, the Commission must find whether a new operation would be consistent with the public interest and the national transportation policy. These statutory standards are not self-limiting, but instead are extremely broad and flexible. They do not suggest that the Commission should be either open-handed or tight-fisted in dealing with applications. This has meant that the task of defining and refining the statutory concepts has necessarily fallen to the Commission, and we must assume that the Congress knew that this would be the case and acted consciously when it adopted such broad criteria.

Contract carriage.—For the sake of convenience, and because it will require relatively brief comment, we shall turn our attention first to contract carriage. The test here is consistency with the public interest and the national transportation policy, and it is usually assumed to entail a lesser standard of proof

than is required in common carrier applications. Also, specific statutory criteria (see 49 U.S.C. 10102(12) and 10923) applicable to contract carrier applications serve to make the applicant's task easier, as they have been construed to place evidentiary burdens upon the opposing carriers. *I.C.C.* v. *J-T Transport Co.*, 368 U.S. 81, 90 (1961). Thus the standard which we announced we would apply in contract carrier applications represents no change from long-standing policy, and it is reaffirmed.

In considering motor contract carrier applications, the Commission's policy will be to find that the effect of a grant of contract carrier authority upon protesting carriers will not be a significant factor unless the protestants themselves can establish that such a grant would endanger or impair their operations to an extent contrary to the public interest.

Common carriage.—Soon after the passage of the Motor Carrier Act of 1935, the Commission, in the *Pan-American* case, articulated tests which it has used since in applying the statutory standard of public convenience and necessity. These tests—the three *Pan-American* criteria—are quoted at the beginning of this decision. The first criterion is directed to whether there is a public demand or need for the proposed service; that is, whether if new authority is granted, it will be used and useful to a prospective customer of the applicant (as is the case in most applications for new authority) or to the applicant and its existing customers (as is the case of applications to use alternate routes or to eliminate gateways). This standard has the effect of placing the overall burden of proof upon the applicant, as required by the Administrative Procedure Act, 5 U.S.C. 556(d). The second *Pan-American* criterion addresses the issue of "adequacy" of existing service. Its effect has been widely construed as placing on the applicant the specific burden of showing that the service it proposes cannot be provided as well by existing carriers. The third criterion goes to the effect which a new competitive service would have on existing carriers' ability to meet the needs of the public they serve.

As we pointed out in the notice initiating this proceeding,

the motor carrier industry today is vastly different than it was during the 1930's when the Motor Carrier Act was being considered and enacted by the Congress, and when the standards for its interpretation and application were being formulated by the Commission.[1]

From a struggling industry in 1935, characterized by one-truck operators providing largely short-haul and local drayage service,[2] trucking today is one of the largest businesses in America. According to the American Trucking Associations, Inc., trucking is the nation's largest employer, with over 9 million employees.[3] The trucking industry's share of the available freight traffic increased from 10 percent in 1940, when it handled about 62 billion ton miles, to 24 percent in 1977.[4] The trucks carried some 510 billion ton miles of freight in 1976, with Federally-regulated carriers handling about 44 percent of that amount, or 225 billion ton miles.[5] Operating revenues as reported to the Commission for 1977 by 857 of the largest motor carriers of property and passengers amounted to over 23.2 billion dollars.[6] The average return on equity for the 100 largest trucking companies, which account for half of all industry revenues, was 18.5 percent for the year ending September 30, 1978,[7] as contrasted to a 14 percent average for industry generally.[8]

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[1] Comments of the Federal Trade Commission, filed February 5, 1979, pages 18-21. See also *Issues in Regulating Interstate Motor Carriers*. Study of the Staff of the U.S. General Accounting Office, pages 12-14 (June 20, 1978).

[2] Hearings before the Senate Committee on Interstate Commerce on S. 1629, S. 1632, and S. 1635, 74th cong., 1st Sess. 312 (1935). The vast majority of firms at that time had only one vehicle and were either owner-operated or employed by one person. In contrast, the average number of vehicles operated by regulated carriers by 1968 was 43. G.A.O. Study page 12.

[3] American Trucking Associations, Inc., *Trucking '77*, 1977 Annual Report, page 9.

[4] Transportation Association of America, *Transportation Facts and Trends*, 14th edition (July 1978).

[5] Interstate Commerce Commission, *92nd Annual Report*, page 134 (1978).

[6] Ibid., page 133.

[7] Interstate Commerce Commission, Bureau of Accounts, *Large Class I Motor Carriers of Property. Selected Earnings Data*, page 1 (December 1978).

[8] Investigation and Suspension Docket No. M-29772, *General Increase, S.M.C.R.C.*, slip opinion, page 24 (November 27, 1978).

As the motor carrier industry has developed, and especially in the past two years, the Commission has placed more emphasis on the need for additional competition than on the protection of carriers already in the market. Our statistics bear this out. During the first ten months of fiscal year 1979 (October 1, 1978–July 31, 1979), 98.4 percent of the motor carrier applications which were decided on the merits resulted in full or partial grants of authority. Of these, all but 4.2 percent represented total grants of the authorities ultimately sought by the applicants.

We wish to emphasize that any change that may have occurred in the direction of a more liberal approach to determining application cases did not result from a repudiation of all or any one of the *Pan-American* criteria. In deciding applications, in balancing the need for a new service against the impact which added competition would have on existing carriers' ability to perform service to the public, we have routinely and consistently addressed and resolved three issues. Has the applicant established a public need for the proposed service? Can existing carriers satisfy the demonstated need? Will the proposed service cause the protestants to be harmed to such extent as to outweigh the benefits to the public? These three questions are no more than articulations of the three *Pan-American* criteria. *Liberty Trucking Co., Ext.—General Commodities*, 131 M.C.C. 573, 574 (1979).

Also working within the framework of the *Pan-American* criteria we have continuously refined the protestant's evidentiary burden. No longer can the mere willingness of an authorized carrier to perform service, or the showing that it has successfully served a supporting shipper, defeat an application. *Superior Trucking Co., Inc., Ext.—Agric. Machinery*, 126 M.C.C. 292 (1977). In the *Liberty* decision on reconsideration, cited above, we reaffirmed our prior finding that a protestant should be required to demonstrate how new competition might materially jeopardize its ability to serve the public, contrary to the public interest. *Liberty*, supra, at 575; *May Trucking Co.* v. *United States*, 593 F. 2d 1349 (D.C. Cir. 1979).

Today, we take a step further. We adopt a policy statement to the effect that an opposing carrier must bear the evidentiary

burden of showing that a grant of authority will adversely affect its operations to the detriment of the public interest, and we expressly eliminate as a factor in making our decision the second *Pan-American* criterion. In addition, we suggest certain non-traditional ways in which an applicant might carry *its* burden of showing that its proposed service will serve a useful public purpose.

Our actions here should not be taken as evidence that we have abdicated our function to determine whether a given proposal is required by the public convenience and necessity. Rather, it means that we are convinced that we have the duty as regulators, charged with administering in today's world a statute that was written and originally construed under vastly different economic and social conditions, to change the standards we use in interpreting and applying the terms and concepts reflected in that statute. See *American Trucking* v. *A., T. & S.F.R. Co.*, 387 U.S. 397, 416 (1967). Our policy, as stated here, reflects our conviction that today's motor carrier industry is generally financially strong, that many segments of the industry have largely competitive characteristics and are capable of being regulated primarily by the economic forces of the marketplace,[9] and that the artificial protections which strict government regulation of entry can provide are currently unnecessary in those instances.

The first of the *Pan-American* criteria places the burden upon the applicant to come forward with evidence of a public need or demand for its service. Under that standard, applicants must show that the service they propose would serve a useful public purpose, responsive to a public demand or need. The normal way to establish this has been for applicants to submit evidence of those who would use the service proposed. We think that this is still the most satisfactory means for an applicant to proceed, for it provides us with the information we need to frame a grant of authority, and provides a factual framework

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[9] Interstate Commerce Commission, Initial Report of the Motor Carrier Task Force (May 1979).

for dealing with the application and the interests of the parties on both sides.

The second *Pan-American* criterion speaks to the question whether the "useful public purpose" which a proposed new operation would meet "can and will be served as well by existing lines or carriers." Thus it raises the issue of adequacy of existing service. In the early days of entry regulation, the effect of this standard was to place upon the applicant the burden of showing that the service it proposed could not be performed as well by existing carriers. As already discussed above, over the years applicants have still been encouraged to provide evidence of their supporting witnesses' experience with available services, but the lack of a showing by the applicant that the existing service is inadequate has not been fatal to its case. Rather the burden has been thrust upon opposing carriers to bear an ever greater evidentiary burden.

The placing of this burden squarely on the opposing carriers is clearly required by today's conditions in the surface transportation industry. As we stated in the notice instituting this proceeding, it is only the opposing carrier who is in a position to show the impact which a grant of authority will have upon it, and it is logical to place upon it the responsibility for developing the record and bearing the burden of producing the evidence as to this issue. We are convinced that the second of the criteria laid down in the *Pan-American* case has outlived its usefulness, and it will no longer be applied.

In determining applications for motor common carrier authority, we will apply these tests:

> (1) The applicant must demonstrate that the operation proposed will serve a useful public purpose responsive to a public demand or need.
>
> (2) The Commission will grant authority commensurate with the demonstrated purpose unless it is established by parties opposing the application that the entry of a new carrier into the field would endanger or impair the operations of existing com-

mon carriers to an extent contrary to the public interest.

Evidentiary Guidelines

The public comments have brought to our attention that, in light of our current entry policy, many carriers do not seem to be aware of the means by which they may oppose effectively an application and thus protect what may be legitimate rights. They are uncertain what evidence must be presented to demonstrate that authorization of a new service might have serious adverse effects upon their ability to continue to provide essential services. It is our responsibility to clarify our current policy regarding the evaluation of applications for permanent motor carrier operating rights.

A carrier opposing a motor carrier entry application should present certain basic evidence to allow us to make a determination about its ability to meet the supporting shipper's service needs. The Commission needs specific factual information to evaluate the degree to which an intervenor's existing operations, and consequently its service to the general public, may be impaired or endangered, to an extent contrary to the public interest, if a new competitive service is authorized. This evidence should be presented in the opponent's verified statement under modified procedure or at the presentation of its case at oral hearing.

The information should include:

(1) A precise description of its pertinent operating authority;

(2) A description of the type and amount of equipment and facilities that it has available to meet the avowed purpose of the application;

(3) A discussion of its present operation; including a description of the specific service it is providing those supporting the application;

(4) The amount of traffic which it has handled that would be subject to diversion to the applicant if the authority sought is granted, and the impact of that diversion on its profitability;

(5) A description of the probable impact on operations which are directly competitive with the service which the applicant proposes;

(6) A statement concerning other adverse impacts of a grant of authority on its business generally and on the public such as:

(a) Need to close particular terminals or other facilities;

(b) The number of employees that would be furloughed or dismissed;

(c) The imbalance of its own operations and other inefficiencies;

(d) Its ability to continue its existing service to the public due to a reduction in total business, loss of particular traffic in a geographic area, or other factors; and

(e) Effects on fuel efficiency.

This decision does not significantly affect the quality of the human environment or energy consumption.

This notice is promulgated under authority contained in 49 U.S.C. 10101, 10321(a), 10921, 10922, 10923, and 5 U.S.C. 553.

Dated: September 26, 1979.

James H. Bayne,
Acting Secretary.

By the Commission, Chairman O'Neal, Vice Chairman Stafford, Commissioners Gresham, Clapp, Christian, Trantum, Gaskins and Alexis. Vice Chairman Stafford and Commissioner Gresham dissenting.

Vice Chairman Stafford, Dissenting

I strongly agree with Commissioner Gresham that this Policy Statement really means quite little in terms of actual impact.

The statement is more symbolic than practical. It evidences the Commission's current attitude toward (or should I say against) regulation in general and entry controls in particular. If anyone needed it, the statement is an indication that things will not be done the way they used to be done. Old theories and old policies will not carry material weight in future deliberations.

Removal of traditional entry barriers is not the only indication of this attitude. Virtual elimination of rate bureaus as ratemaking organizations is about to be realized. Rate flexibility (in terms of no-suspend zones and even no-notice zones) appears not too far away.

The policy statement disturbs me because it implies that what the ICC has been doing for over forty years has not been in the public interest. I have said it before, and it may sound trite, but I believe the ICC has done a surprisingly good job of regulating. Service is generally better than adequate, and prices are reasonable. There is substantial and healthy competition in the trucking industry. Obviously, the industry has matured. But with all the rhetoric, no one has ever shown with any degree of reliability that most of the same problems that existed before the Motor Carrier Act of 1935 will not be visited upon us again when all of these so-called reforms are implemented.

Had all of these changes occurred in one proceeding, I am confident that any reviewing court would have found that they exceed the bounds of what an agency may do toward self-deregulation. The tactic of smaller, individual rulemakings, each with a limited specific change, has proven very effective in achieving major changes without legislation. Unfortunately, no reviewing court has had the big picture before it; and I doubt if any court ever will. This proceeding represents one more minor rulemaking that is part of a major policy overhaul.

Commissioner Gresham, Dissenting:

How does the majority's statement of "new" policy really change the actual policies which currently are followed by the Commission in deciding the fate of operating rights application cases? This is the real question as I see it. The answer seems to be that no real change has been made. Candidly, I must label this policy statement as "window dressing."

Those who are familiar with current Commission policy undoubtedly can accept this label as accurate and must surely wonder why the Commission has expended so much time and effort merely for the sake of telling them what they already know. Frankly, I do not know why.

At one point the majority states "that in the *past* (emphasis added) the Commission might have relied too heavily on adequacy of existing service, thus impeding the growth of beneficial competition." The key words in that quote are "in the past." I believe even extreme critics of regulation would agree that this quoted analysis of the past does not accurately depict the trend of current regulation by this Commission. I believe these critics would even concede that currently, adequacy of existing service is not the decisive factor in final decisions of this Commission. Going a step further, these critics, if objective, would confirm that today the Commission decides application cases by determining whether the public benefits of a grant of new authority outweigh the detriments which would flow from such a grant and by considering the competitive impact of the outcome of application cases. Today these are the decisive factors, not mere adequacy of existing service. So again, I must ask why the majority has taken such pains to bury court approved and time-tested standards which, as presently applied by the Commission, result in the enhancement of effective competition while avoiding the extremes of destructive competition?

I wonder what the majority believes it actually has changed. Does the majority think that this "new" policy will alter the outcome of application cases? I think not. To illustrate, con-

sider a hypothetical, and very simplistic case. A person who wants new operating authority asks a shipper to support his application for this authority. The shipper agrees to do so. This supporting shipper then tells the Commission that it receives wholly adequate service from existing carriers and that carrier competition for its traffic is intense. Assuming that there are no other issues, or overriding factors present in the case such as substantial fuel saving which would result from a grant of this new authority, would the fate of this application differ under the "new" policy from its fate under current Commission policy? The answer is no! I believe that the application would be denied irrespective of whether the "new" policy or the current policy of this Commission was in effect. The only real difference would be in the words used in the decision. Under current policy, the Commission's decision might mention that existing service is adequate although its analysis went far beyond that particular aspect of the case to factors such as the effect of a grant on competition. Under the "new" policy the Commission would merely avoid mentioning the fact that existing service is adequate and instead might say that its denial is based on the fact no useful public purpose would be served by a grant of this new authority. Thus, we have a distinction without difference! Here we have another semantic wrestling match, an exercise from which I will refrain and to which I must respectfully dissent.

As a final point, I challenge the majority to count the number of cases in which this Commission has followed the current administrative policy that operating authority may be granted even if an applicant does not prove that existing service is inadequate. Yes, they are too numerous to count! Again, I must ask why so "much ado about nothing?"

44 Fed. Reg. 64845
(November 8, 1979)

INTERSTATE COMMERCE COMMISSION
49 CFR Chapter X
[Ex Parte No. MC-133]

Entry Flexibility—Regular-Route Passenger Service

AGENCY: Interstate Commerce Commission.

ACTION: Notice of filing of petition for the institution of rulemaking proceedings.

SUMMARY: By petition filed August 17, 1979, Transportation Consumer Action Project proposes the institution of a rulemaking proceeding to improve the quality and availability of consumer travel options by easing regulatory barriers to entry in the intercity bus industry.

By this notice, the ICC invites public comments on the petition.

DATES: Comments must be received on or before January 7, 1980.

ADDRESS: Send comments to: Office of Proceedings, Interstate Commerce Commission, Washington, DC 20423. Petitioner's Representative: Mimi Cutler, Transportation Consumer Action Project, Suite 715, 1346 Connecticut Ave. N.W., Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: James L. Brown, (202) 275-7898 or Donald J. Shaw, Jr., (202) 275-7292.

SUPPLEMENTARY INFORMATION:
Transportation Consumer Action Project (TCAP) is a nonprofit consumer organization which was recently formed to study consumer interests in federal regulation of surface transportation, to educate consumers about the impact of these policies, and to represent consumer interests before regulatory agencies. TCAP's members include major consumer groups

around the country, including groups located in Arkansas, California, Iowa, Michigan, New York, and Wisconsin.

Petitioner asserts that there is a compelling need for the Commission to allow new companies to enter the intercity bus industry and to permit existing carriers to expand their operations and serve new communities. It argues that easing regulatory barriers to entry would improve and expand passenger service options while promoting healthy competition, energy conservation, and efficiency. These are all goals of the National Transportation Policy (49 U.S.C. 10101) and assertedly can be achieved by making a general finding that reduced entry barriers in the intercity bus industry are consistent with the public interest and by adopting a rule which allows all fit, willing, and able persons to obtain certificates to provide intercity bus service nationwide as common carriers. All carriers (both existing companies and new entrants) applying for authority to operate new service under a certificate would file a declaration of the particular markets they propose to enter and the minimum levels of service they commit themselves to provide.

In making this petition to lower regulatory entry barriers, TCAP is not suggesting that the Interstate Commerce Commission's policy regarding exit restrictions be liberalized at this time, nor is it petitioning for total deregulation of the intercity bus industry, since the proposal would not affect ICC control over exit, or over adequacy of service, applicant fitness, and fares. Rather, the thrust of this petition is to encourage new entry into markets by existing and new bus companies. To give carriers some flexibility in adding new communities and new routes, TCAP proposes that the Commission consider giving carriers who apply for new authority the option of declaring for a fixed period of time (e.g., one year) and then allowing the company to amend its declaration if it decides it wants to continue serving the route in question. It also proposes that the Commission periodically review the extent of new service generated by this rule and prepare an evaluation of this policy 3 years after it has been in operation. TCAP asserts that our easing barriers to entry in the industry would greatly benefit

consumers, due to gasoline shortages and increased oil prices. An easing of entry barriers, it argues, would also have a positive effect on the service quality of bus travel by promoting service competition, would improve efficiency by allowing existing carriers to reduce excess capacity by responding more flexibly to passenger demand, and would promote and stimulate healthy competiton in the industry. Petitioner points out that the intercity bus industry is highly conecentrated, with Greyhound Lines, Inc., and Trailways, Inc., together accounting for 81.4 percent of Class I revenues and 60.7 percent of total industry revenues for 1978. Greyhound alone earns 57.4 percent of Class I revenues and 42.8 percent of total intercity revenues. It also points out that Greyhound is the largest manufacturer of intercity buses and Trailways is the second largest. TCAP argues that the intercity bus industry is not a natural monopoly possessing inherent economies of scale, since many small bus companies do exist and have average costs significantly lower than those of Greyhound. It also asserts that the easing of entry barriers would not create destructive competition, because fixed costs are low and equipment is mobile and quickly depreciated.

Petitioner also supports the proposal in Ex Parte No. MC-125, to establish a zone of reasonableness within which fares could be lowered without prior approval and asserts that, although free entry alone would promote improved service, the combination of free entry and downward fare flexibility would encourage both expanded service and price competition.

A petition on the same general topic was filed on July 23, 1979 by Trailways, Inc., but by letter dated August 28, 1979, before notice of that petition could be published, Trailways has requested that its petition be withdrawn. The Trailways petition had proposed the institution of a rulemaking proceeding for the adoption of regulations which would provide that authority be granted to operate intercity bus service over routes that are currently not served at all or are served only by a Class I carrier with gross operating revenues from intercity scheduled service of $12 million or more during the last calendar year, upon a showing of the applicant's fitness and willingness to provide

the service. In determining any carrier's gross operating revenues for the purposes of this proposal, the carrier in question would be deemed to include all carriers controlling, controlled by, or under common control with any particular company. Trailways had pointed out that the industry has been dominated by Greyhound for decades, since, in 1978, Greyhound held a 62 percent share of Class I intercity bus passenger revenues and a 64 percent share of intercity passenger miles, while its nearest rival, Trailways, held a 22 percent share of passenger revenue and a 23 percent share of passenger miles. Trailways had formulated its proposal specifically so as to ensure that small carriers would not suffer any ill effects as a result of its implementation—not to suggest that small carriers would necessarily be injured or that they should be free from additional competition, but rather in recognition of vigorous opposition by such carriers to other recent Trailways initiatives to reform and liberalize regulation of the bus industry.

Based upon the Financial and Operating Statistics of Class I Motor Carriers of Passengers for the period from January 1 through December 31, 1977, published by the Bureau of Accounts of the Interstate Commerce Commission, there would have been three carriers whose "Intercity Scheduled Passenger Operating Revenues" would have placed them in the "unprotected" category under the Trailways proposal for the year 1978: Greyhound Lines, Inc. (over $400 million); Trailways, Inc., and its commonly controlled affiliates (well over $100 million); and Carolina Coach Company ($13,845,011). The only other carrier with intercity schedule revenue in excess of $10 million is Transport of New Jersey (primarily a local or suburban carrier), listed at $11,291,778, but under the proposal as it had been stated, the effects of inflation could mean that carriers could "grow" into the unprotected category without experiencing any real increase in business.

The Commission is not actually proposing any regulations at this time, but may do so later if the comments presented in response to this notice indicate that such an action would be warranted. Although Trailways has requested that its own proposal be withdrawn, that proposal still presents points of

potential interest on this subject. Therefore, comments are invited with respect to both proposals if any interested person chooses to do so. No oral hearing is contemplated. Any person (including petitioner) desiring to participate in this proceeding shall file an original and fifteen (15) copies (wherever possible) of written representations, views, or arguments. A copy of each representation shall be served on petitioner's representative.

Written material or suggestions submitted will be available for public inspection at the Office of the Interstate Commerce Commission, 12th Street and Constitution Avenue, NW, Washington, DC, during regular business hours.

Notice to the general public of these matters will be given by depositing a copy of this notice in the Office of the Secretary of the Commission for public inspection and by filing a copy with the Director, Office of the Federal Register.

Decided: October 30, 1979.

By the Commission, Chairman O'Neal, Vice Chairman Stafford, Commissioners Gresham, Clapp, Christian, Trantum, Gaskins, and Alexis. Vice Chairman Stafford dissenting.

Agatha L. Mergenovich,
Secretary.

VICE CHAIRMAN STAFFORD, dissenting:

I would reject the petition.

In so voting, my concern with TCAP's petition is its undue breadth and a corresponding lack of factual foundation. A reading of the petition leads to the conclusion that there is in reality only one basis for entertaining the petition, even if for only comments—the preconceived notion that "competition is good," or the converse, "regulation is bad."

The remainder of the petition rests on philosophy or suppositions such as energy conservation;[1] that the number of bus

[1] I find this a curious argument for the obvious reason that two carriers operating between two points almost by definition will consume more fuel than one carrier.

passengers will increase[2] or that somehow increased competition will enhance the public's image of bus travel.

In short, I find it a highly dubious process to ask for comments on such broad topics at considerable expense to both the Commission and private parties. TCAP simply has not met its burden in justifying such a massive proceeding.

[2] This evidently is based on a newspaper article.

Interstate Commerce Commission
Washington, D.C. 20423
DEC 15 1980

OFFICE OF THE CHAIRMAN

Honorable Howard W. Cannon
Chairman
Committee on Commerce,
Science, and Technology
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for providing the Interstate Commission the opportunity to comment on S. 2895, the "Bus Regulatory Modernization Improvement Act of 1980," and to develop and present our views on regulatory reform of the motor bus industry. Enclosed you will find a package which includes our analysis of and comments on S. 2895, our proposed regulatory reform bill, an analysis of this proposal, and a report on the purpose of and need for new legislation.

Our legislative proposal for regulatory reform of the bus industry is the result of many hours of analysis by our staff and consultation with representatives from the industry and state regulatory officials. A draft version of the proposed bill was circulated to participants at the Conference on Intercity Bus Transportation sponsored by the Transportation Research Board at the National Academy of Sciences on September 22-24, 1980, and a number of helpful comments were received from those participants.

We believe that this proposed legislation represents a viable and progressive solution to the problems facing the Nation's motor bus industry, and would promote both better financial health for the carriers and more effective service to the public. We look forward to working with the Committee in the months ahead as this issue begins to receive greater attention by the

Congress. Of course, we stand ready to assist you and the Committee on a continuing basis in any way we can.

Sincerely yours,

Darius W. Gaskins, Jr.
Chairman

Enclosure

MOTOR BUS ACT OF 1981
REPORT

Purpose

This legislation is a part of a continuing effort to reduce unnecessary regulation of the surface transportation industries. In the first major piece of reform legislation, the Motor Carrier Reform Act of 1980, the Congress set out a balanced approach to the regulatory reform of the trucking industry. The intercity bus industry was specifically excluded from most of the provisions of the new motor carrier bill in order that it might be given special attention and analysis at a later time because of the industry's differences compared to motor carriers of property.

This proposed legislation takes into account the similarities of the trucking and bus industry and generally adopts numerous sections of the recent motor carrier legislation for application with minor modification to the bus industry. Interstate bus and truck transportation have shared a common regulatory framework since the two modes were brought under ICC regulation in 1935. Despite several important differences between the two industries, a workable regulatory reform package for the bus industry can be developed incorporating many of the elements of the Motor Carrier Act of 1980 and additional legislative provisions specific to certain unique characteristics of the bus industry.

The intercity bus industry faces numerous competitors in the intercity travel market. Competition from Amtrak, the airlines, and especially the automobile forces the bus industry to be very conscious of pricing policies and the services offered. Intermodal competition generally protects the bus passenger by forcing bus companies to be competitive. However, in this competitive environment it is also extremely important for individual bus companies to have the flexibility to experiment with new markets or services and compete with other bus

companies as well as competing with other transportation modes for passengers. Intermodal and intramodal competition for passengers is the best assurance that the traveling public will be protected from high fares and that the services provided will be responsive to passenger demand.

As in the case of the regulatory reforms in the trucking industry, this bill increases the opportunities for intercity bus carriers to operate with minimal governmental interference. Entry into new routes by new or existing carriers would be greatly simplified and a more certain procedure for exit from unprofitable routes would be established. At the same time a common carrier's obligation to provide the service he purports to hold out to the public would be retained.

Individual intercity bus companies would have greater flexibility, within certain limits, to price their services taking into account all factors such as competition, cost increases and different qualities of service with only minimal governmental regulation or interference. We think this policy is the most practical and efficient method available for maintaining adequate rural service, service to the poor, the elderly, the military, and students. Route restrictions would be eliminated resulting in greater flexibility, more efficient load factors, and more efficient use of fuel. Antitrust immunity would be granted only for discussions between individual carriers with non-competitive end-to-end connecting routes to develop joint rates and through routes. This would protect individual carriers in developing joint rates but would minimize anticompetitive collective behavior and so provide important protection for consumers. The administrative procedures affecting the bus industry would be brought in line with those of motor carriers of property.

This bill, like the motor carrier bill that it is fashioned after, represents a responsible approach for those who wish to see a serious reduction in Federal regulation and a corresponding increase in competition, without eliminating the entire regulatory structure.

Background and Need

This recommended draft legislation is the product of an extensive study of the unique structure and problems of the intercity bus industry and a careful consideration of regulatory reforms and other measures needed for the industry to continue to operate profitably and provide adequate service to the public.

Recent Commission actions with respect to the intercity bus industry had their genesis at a 1977 Senate Commerce Committee hearing on the financial condition of the intercity bus industry. During the hearing the Chairman of the ICC promised Senator Long that the Commission would conduct a study of the financial condition of the industry. The Commission report, *The Intercity Bus Industry, a Preliminary Study*, was issued in May, 1978. The study dealt with industry development, market structure, cross-subsidy, public subsidy, ridership trends, demand forecasts, financial performance, and recommendations for further activity. The central conclusion was that financial performance was very poor and declining in regard to regular route service.

Follow-up work on the issues discussed in the May 1978 report began in early 1979. At that time the Bus Industry Study Group was established by the Chairman with the charge to review the existing system of economic regulation and to recommend ways to improve it. The emphasis was on how to improve effectiveness and efficiency through changes in the system of regulation. After reviewing the economic regulation of the industry, the October, 1979, *Report of the Bus Industry Study Group*, presented a series of recommendations for easing regulation in the various segments of the bus industry. This report provided the Commission with a focal point for reviewing regulation of the bus industry and made suggestions for change. A Commission open conference was also held on bus industry policy. This work continued with the Commission staff doing additional analysis of the industry in response to issues raised at the Commission conference. A second Issues and Options paper on Bus Policy was [illegible] to the Commission

on March 4 and followed by an open public conference on March 11, 1980. The options paper presented the Commission a workable administrative approach to reform of bus industry regulation by the ICC.

In addition to the more general studies of the bus industry and the question of regulatory reform, the Commission has initiated a number of formal proceedings covering specific aspects of the regulation of the bus industry and proposals for reform. Each of these proceedings is important in terms of more fully understanding and resolving particular issues. Collectively, information from these proceedings related to the bus industry and similar proceedings for the property carriers has helped shape the proposals for regulatory reform of the industry presented here. The recent formal Commission actions which pertain to the bus industry included the following more significant proceedings:

Ex Parte No. MC-125, *Fare Flexibility for the Bus Industry*. This rulemaking proposed complete pricing flexibility for charter operations and zone-of-reasonableness pricing for regular route operations, subject to restrictions against predatory and discriminatory behavior.

Ex Parte No. MC-126, General Temporary Order No. 18, *General Temporary Authority, Regular-Route Passenger Operations*. This decision provided for a relaxed entry period from July 12 to September 25, 1979 for the purpose of accommodating Summer and early Fall demand for bus travel that was expected to be generated as a result of automobile fuel shortages and fuel prices.

Ex Parte No. MC-121, *Policy Statement on Motor Carrier Regulation*. The Commission decided that in applications for regular route authority where applicants show that the service proposed is responsive to a useful public purpose, and that they are fit to perform that service, the Commission will grant the application unless those opposing it demonstrate that a grant of authority would endanger their operations contrary to the public interest.

Ex Parte No. MC-133, *Entry Flexibility—Regular Route Passenger Service*. This notice of a petition to institute a rulemaking proposes easing regulatory barriers to entry in the intercity bus industry.

Ex Parte No. 297 (Sub-No. 3), *Modified Terms and Conditions of Collective Ratemaking Agreements Under Section 5a*. The Commission announced that it decided to eliminate collective carrier voting or agreement on single-line rates. Collective determination of joint-line rates would have been permitted but would have been limited to carriers that could "practicably participate" in such movements.

Ex Parte No. 297 (Sub-No. 4), *Section 5a Application No. 9-A, National Bus Traffic Association, Inc.—Agreement*. In this proceeding the Commission addressed the issue of whether or not there exists a continued need for antitrust immunity for the Bus Industry. The Staff presented an issues and options paper to the Commission. A Commission open conference was held on the subject on January 16, 1979.

All of these Commission actions, whether formal proceedings or studies of the industry have as their ultimate goal the encouragement of more efficient intercity bus industry. All of these formal and informal sources generated useful information to fill in information gaps about the industry and assisted the Commission in developing a coordinated approach to the question of regulatory reform in the intercity bus industry. In the process of developing a coordinated statement about bus regulatory reform, the Commission is aware of a few problems that may be significant impediments to meaningful relaxed regulation in this industry. The legislative recommendations contained in our recommended bill reflect our perception of what reforms are needed to effectively enhance competition and to minimize regulatory barriers while at the same time properly addressing the unique problems of the bus industry.

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SECTION BY SECTION ANALYSIS TO ACCOMPANY THE "MOTOR BUS ACT OF 1981"

Section 2. ***Purpose of The Act.***

The stated purpose of this section, that the Intercity Motor Bus Act is part of the continuing effort by Congress to reduce unnecessary regulation by the federal government, is identical to the purpose expressed in the Motor Carrier Act of 1980.

Section 3. ***Congressional Findings.***

This section tracks Section 3 of the Motor Carrier Act of 1980 and Section 2 of the Household Goods Transportation Act of 1980 on the grounds that Congress' findings should essentially be of the same nature in the area of bus regulatory reform. It has been suggested by some that the Congressional findings ought to be changed somewhat in the area of bus regulation to reflect differences in the competitive situation in that industry vis-a-vis the trucking industry or to reflect a Congressional policy relating to bus terminals and subsidies, or both. While we believe the latter issues are of concern, there is no body of evidence substantiating these concerns. Accordingly, we do not propose in this legislation that specific measures be undertaken to meet these problems except insofar as they should be monitored and studied. In addition, we do not recommend expansion of the Congressional findings along those lines until these studies are completed.

Section 4. ***National Transportation Policy.***

The changes suggested here merely incorporate* passenger carriers into the new National Transportation Policy applicable to motor carriers of property since enactment of the Motor Carrier Act of 1980. We believe that the goals expressed in that

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* Vice Chairman Gresham notes that Paragraph (7)(B) of the current National Transportation Policy "allows" a variety of quality and price options, while the draft bill would "encourage" it. If a substantive change in meaning is intended, he believes it should be so labeled.

legislation are equally appropriate to motor carriers of passengers.

Section 5. ***Motor Carrier Entry Policy.***

We propose to amend Section 10922 of Title 49, United States Code, by incorporating motor carriers of passengers into the changes mandated for motor common carriers of property by the Motor Carrier Act. Thus, both kinds of motor carriers will be treated alike.

It has been suggested by some that an essentially different kind of treatment is needed for entry policy relating to motor carriers of passengers because of the different competitive circumstances that obtain in that industry. Unlike the trucking industry, where no one carrier controls more than 5 percent of the total market, the bus industry is clearly dominated by one carrier—Greyhound—which in terms of 1978 operating revenue represents approximately 60 percent of the Class I intercity bus revenues and approximately 44 percent of the total intercity bus industry. Trailways and the Trailways affiliated bus system follow with approximately 24 percent of the Class I intercity bus revenues and approximately 18 percent of the total industry market, and the remainder is divided among numerous smaller carriers.

This situation has led to a number of suggestions for different treatment of the bus industry. The industry bill, S. 2895/ H.R. 7677, proposes a considerably more restrictive entry standard than that which Congress adopted in the Motor Carrier Act. The provisions of the industry bill restricted the public convenience and necessity standards by requiring that grants of operating authority be based upon a preponderance of the evidence in individual cases. There are strong restrictions on granting new authority for publicly-owned carriers and a requirement that rates recover all costs. In general, we believe that the overall direction of S. 2895/H.R. 7677 is anticompetitive as it relates to entry policy. It is particularly inappropriate in the case of the bus industry with its dominant pair of firms—a structural feature which in our view calls for an especially

liberal entry policy to assure competitive and efficient rates and service.

Strong intermodal competition faced by the bus industry increases the need for competition between bus companies if the bus industry is to successfully meet this challenge. In addition, the more flexible entry policies we recommend create strong pressure from potential market entrants on existing carriers to be more competitive. Indeed, intermodal competition and the threat of potential entry create a strong incentive for existing carriers to price competitively and meet customer demands for service. Failure to serve adequately or monopoly prices could result in loss of a market to another bus carrier or another mode such as the private automobile.

Another approach which has been suggested would be to curtail the ability of the largest carrier, Greyhound, from gaining new authority while other carriers have an opportunity to gain larger shares of the total market under the liberalized entry provisions of new legislation. Such an approach, it is argued, is necessary to reduce Greyhound's market share of bus traffic nationally under a system of reduced regulation. We do not favor that approach for several reasons. First, we believe that such an approach would interfere unnecessarily with Greyhound's own prerogatives and is inconsistent with a policy based on competition. Second, it reflects a "blunt instrument" approach to a variety of different market situations, including those where adequate competition presently exists, those where Greyhound has an effective monopoly in certain markets, and those where other carriers have effective monopolies in certain markets. However, the thrust of this bill as a whole is to substantially reduce regulation but not to eliminate it altogether. Thus, the fear that some smaller carriers may have of unlawful retaliatory actions by larger carriers when they file for new and expanded authority appears to be unjustified in that the Commission could still afford protection through the regulatory process. The purpose here is merely to create a firm presumption in favor of applicants for new or extended authority.

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In summary, we believe that the most valid approach to bus entry policy at this time is to conform it to the entry policy of the Motor Carrier Act. While clearly the situation of the bus industry is not identical to that of the trucking industry, we do not believe that other more restrictive or more complicated entry schemes are justified at present. At a minimum, we believe that the approach of the Motor Carrier Act is a sound and progressive course for Congress to take at this time and should be tried before other courses are adopted. Such a course will give necessary protection to the carriers while at the same time expand the opportunity to compete.

Section 6. ***Removal Of Certain Restrictions On Bus Operations.***

We propose here to apply the restriction removal provisions of Section 6 of the Motor Carrier Act to bus operations, and to add a new subsection prohibiting "closed-door" restrictions by the states which apply to carriers operating under interstate certificates.

In general, we believe that the policies behind the restriction removal section of the Motor Carrier Act apply with equal logic and force to bus carriers. Prominently in this category are such matters as gateway, circuitous route, and intermediate point restrictions.*

However, there is one type of restriction which is not dealt with by the Motor Carrier Act, and that is the closed-door restriction imposed by some states on interstate bus traffic.

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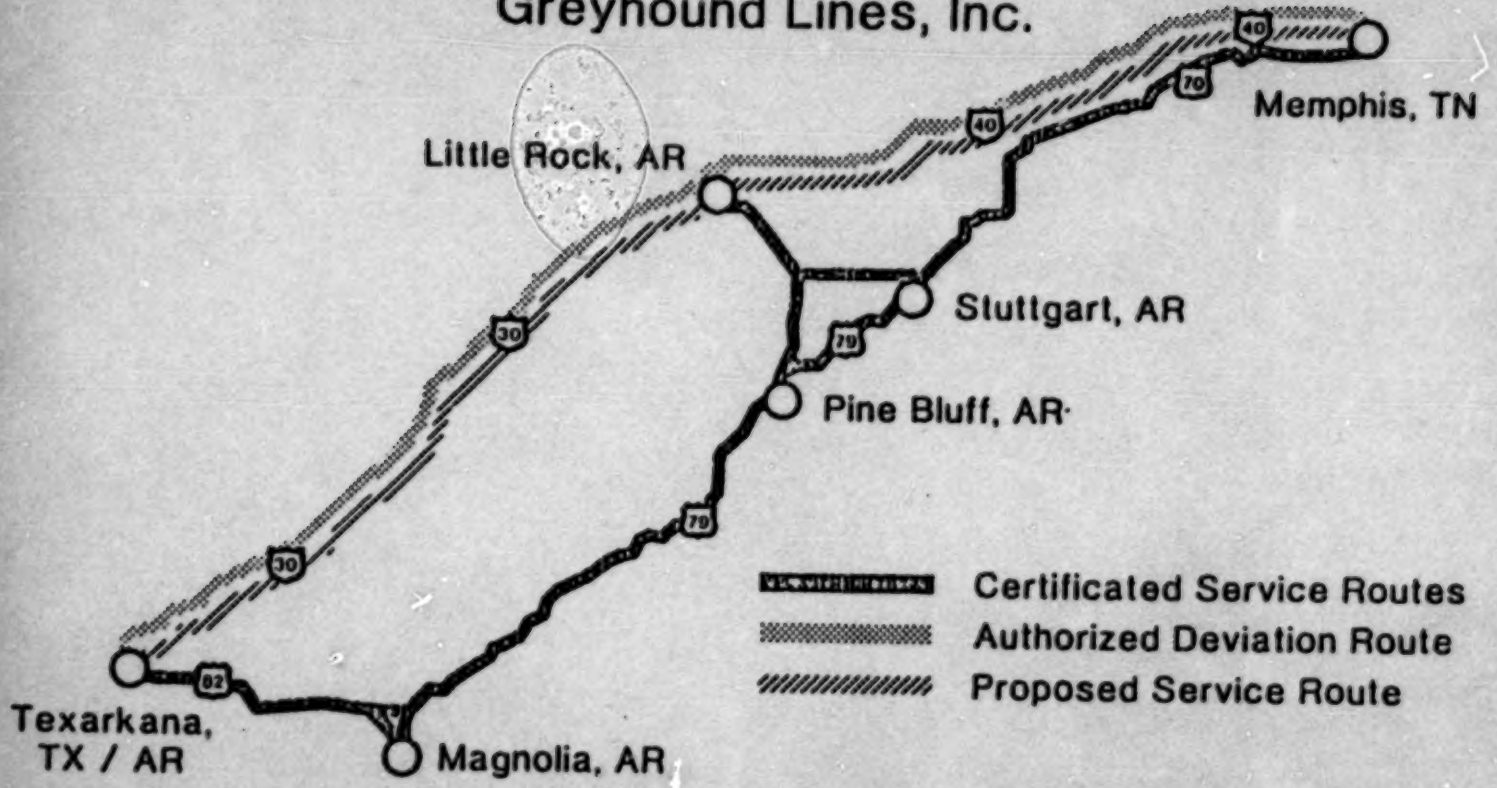
* Vice Chairman Gresham notes that the gateway elimination proposal, insofar as it applies to regular-route passenger operations, may clash with Section 10922(d)(3) of the Act, which the Commission's bill leaves undisturbed. He believes that a better approach might be to liberalize the Commission's passenger superhighway and deviation rules, while retaining reasonable and adequate service over the authorized regular route. See 49 C.F.R. 1042 and Ex Parte No. MC-65 (Sub-No. 6), *Petition to Revise Passenger Motor Carrier Superhighway and Deviation Rules*, 44 Fed. Reg. 6580-83, February 1, 1979.

Under a typical closed-door restriction, a carrier is prohibited from picking up or dropping off passengers moving between intermediate points within a single state when the operation as a whole is conducted interstate pursuant to a certificate granted by the Commission. Thus, for example, a carrier moving from Columbus, Ohio, to St. Louis, Mo. via Indianapolis and Terre Haute might be prohibited from picking up passengers at Indianapolis to be dropped off at Terre Haute. Such schemes are generally designed to protect carriers from competition. Using the same example, the closed-door restriction described would assist intrastate carriers or other carriers authorized to transport passengers between Indianapolis and Terre Haute.

While we recognize that our recommendation relating to state closed-door restrictions represents an incursion into an area traditionally left to state regulation, we believe that these restrictions cause an undue burden on interstate commerce and can no longer be justified. The viability of interstate operations authorized by the Commission is at stake—interstate carriers often need intrastate passengers along the way to make their overall routes profitable. These restrictions should be viewed in light of the historically declining financial position of the bus industry. Nor can closed-door policies be justified in the light of policies favoring both increased competition among interstate carriers, and improved operational and energy efficiency in an era of diminishing resources.

* * *

Pertinent Routes of Greyhound Lines, Inc.



BEFORE THE
INTERSTATE COMMERCE COMMISSION

IN THE MATTER OF:
GREYHOUND LINES, INC. — EXTENSION—LITTLE ROCK, ARKANSAS — DOCKET NO. MC-1515 (Sub-No. 255F)

VERIFIED STATEMENT
OF
MALCOLM MYERS
VICE PRESIDENT OF TRAFFIC
TRAILWAYS, INC.

I. ***Legal Name and Domicile of Carrier.***

Trailways, Inc. is a Delaware corporation with its principal offices located at 1500 Jackson Street, Dallas, Texas 75201. Trailways is a motor common carrier of passengers operating pursuant to authority granted by the Interstate Commerce Commission. In addition, pursuant to authority granted by the ICC Trailways, Inc. controls other motor common carriers of passengers, namely American Buslines, Inc., Arkansas Motor Coaches, Ltd., Inc., Trailways Bus System, Inc., Trailways Southeastern Lines, Inc., Trailways Southern Lines, Inc., Trailways Tennessee Lines, Inc., Denver Colorado Springs Pueblo Motorway, Inc., Edwards Motor Transit Company, Midwest Buslines, Inc., Safeway Trails, Inc., Service Coach Lines, Inc., Tamiami Trail Tours, Inc., Trailways of New England, Inc., Union Buslines, Inc., and Virginia Stage Lines, Inc. Under its own certificates and those of its subsidiaries, Trailways provides motor bus service to, from, and between thousands of points

throughout the Continental United States in both intrastate and interstate commerce.

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II. *Identity and Qualifications of Testifying Witness.*

My name is Malcolm Myers, and I am Vice President of Traffic for Trailways, Inc. and have held this position since 1976. Among my duties is to represent Trailways and its subsidiaries in various state and federal regulatory proceedings. I have been in the bus industry since 1951, serving as Traffic Manager of Continental Southeastern Lines, Inc. (a wholly owned subsidiary of Trailways, Inc.) from 1965 to 1976. I am thoroughly familiar with this application and have been authorized by Trailways and its subsidiary carriers to submit this Verified Statement.

III. *Specific Pertinent Conflicting Authority.*

By virtue of this application, Greyhound Lines, Inc. seeks to operate between Texarkana, Texas and Memphis, Tennessee over Interstate Highway 30 to Little Rock, Arkansas, thence over Interstate Highway 40 to Memphis, Tennessee serving the intermediate point of Little Rock, Arkansas. The authority sought in this application directly conflicts with and is totally duplicative of authority held by Arkansas Motor Coaches, Ltd., Inc.

As pertinent, Arkansas Motor Coaches, Ltd., Inc., a wholly owned subsidiary of Trailways, Inc., holds authority from the Interstate Commerce Commission in Docket No. MC-50026 and subnumbers thereunder to operate over regular routes transporting passengers and their baggage and express and newspapers in the same vehicle with passengers between Memphis, Tennessee and Texarkana, Texas serving all intermediate points with one non-pertinent exception, from Memphis over U.S. Highway 70 to Hot Springs National Park, Arkansas, thence over Arkansas Highway 7 to Arkadelphia, Arkansas, thence over U.S. Highway 67 to Texarkana, and return over the same route.

Arkansas also holds appropriate deviation authority (Deviation No. 17, 16, and 15) to operate via Interstate Highways 30 and 40 between Texarkana and Memphis, serving various intermediate points, including Little Rock. A copy of Arkansas' pertinent deviation authority is attached as Appendix B.

IV. ***Pertinent Terminals and Communications Network.***

Arkansas and the other protestants in this proceeding operate through various areas of the United States. Together with Arkansas these protestants operate over a network of routes traversing most of the United States. Protestants maintain large fleets of equipment and numerous terminals and agencies, and employ a large force of employees in the performance of service to the public over their nationwide route system. Protestants maintain a nationwide communications network and provide nationwide bus service through joint through routes, fares, and rates.

Specifically, protestants maintain company-owned terminals at Texarkana, Little Rock, and Memphis, and agency stations at the intermediate points of Benton, Malvern, Arkadelphia, Gurdon, Prescott and Hope, Arkansas.

V. ***Pertinent Equipment.***

Arkansas and the named protestants operate through bus service between thousands of points throughout the Continental United States utilizing a substantial fleet of equipment which operates in a nationwide network of bus pools. These pools enable passengers to travel over the routes of various Trailways subsidiaries without a change of bus. Arkansas has sufficient equipment to meet

all present and foreseeable future transportation requirements for its regular route operations between Memphis and Texarkana, serving Little Rock. On a nationwide basis protestants

operate and maintain a fleet of approximately 2,000 intercity buses, all of which are equipped with restroom facilities, tinted windows, and reclining seats. Attached as Appendix C is a brochure describing the equipment operated by protestants.

Arkansas and the other Trailways subsidiaries maintain garage facilities throughout the Continental United States. Protestants operate maintenance facilities at Memphis and Texarkana. These facilities are staffed with highly qualified and skilled mechanics who can quickly and efficiently service and maintain the equipment.

VI. *Type of Service Offered.*

Arkansas operates in intrastate and interstate commerce providing regular route service in the transportation of passengers and their baggage and express between Memphis and Texarkana, serving Little Rock, as well as other intermediate points.

Currently, Arkansas operates six round-trip schedules each day between Memphis and Texarkana, which serve the intermediate point of Little Rock. Two of these round-trip schedules operate non-stop between Memphis and Little Rock, and between Little Rock and Texarkana. The remaining four daily round-trips make additional stops at small intermediate points between Memphis, Little Rock, and Texarkana. Arkansas provides additional trips each day which operate either between Memphis and Little Rock, or between Little Rock and Texarkana.

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These schedules are set to operate at convenient times throughout the day and night. For example, Arkansas has schedules departing Memphis from 3:30 A.M. until 11:30 P.M., arriving in Little Rock from 2:15 A.M. until 9:45 P.M., and arriving in Texarkana from 12:20 A.M. until 11:30 P.M.

In the opposite direction, Arkansas has schedules departing Texarkana from 2:15 A.M. until 8:50 P.M., arriving in Little

Rock from 1:10 A.M. until 11:30 P.M., and arriving in Memphis from 12:05 A.M. until 11:00 P.M. As can be seen, Arkansas operates service between the involved points at all hours of the day or night. This service is provided to be available to meet the demands of the travelling and shipping public. The schedules showing the service which Arkansas renders between the involved points is set forth as Appendix D.

Arkansas, together with the other name protestants, offer and provide frequent daily regular route service and operate numerous daily schedules over all of their routes, and together serve numerous points throughout the United States beyond Memphis and Texarkana. The National Trailways Bus System (NTBS) is an association of independent interstate carriers, of which Trailways, Inc. and its subsidiaries are members, which system provides nationwide bus service through joint-through routes, fares, and rates. Protestants regularly provide such service with other NTBS carriers, including Adirondack Trailways, Blue Valley Bus Lines–Western New York Motor Lines, Inc., Capital Trailways, Capitol Trailways of Pennsylvania,

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Carolina Trailways, Colonial Trailways, Cascade Trailways, Duluxe Trailways, Inc., Empire Trailways, Evergreen Trailways, Lake Front Trailways, Martz Trailways, Pacific Trailways, Pine Hill Trailways, and Southeastern Trailways, Inc.

VII. ***Traffic Subject to Diversion If Application Granted.***

Arkansas and the other protestants are not operating to capacity. They have the ability and capacity to handle adequately and efficiently additional passengers, their baggage, and express over their routes and, in particular, between Memphis, Little Rock and Texarkana. Such protestants need all the revenue they can generate to maintain their high quality of operations. Specifically, traffic moving from Little Rock destined to Texarkana and points south of Texarkana, and traffic moving from Little Rock and destined to Memphis and points

north of Memphis would be subject to diversion if this application were granted. Such a diversion would seriously harm protestants.

Attached as Appendix E is a traffic study reflecting a portion of Arkansas' interstate traffic which would be subject to diversion should this application be granted. For the ten day period between July 11 through July 20, 1979, Arkansas sold 501 passenger tickets from Little Rock to Memphis and beyond and from Little Rock to Texarkana and beyond. Annualized this figure becomes 18,286 tickets subject to diversion. Revenues generated during this ten day period were $17,367.40, which annualized becomes $633,910 in revenues subject to diversion. Because of the difficulty in obtaining tickets sold from hundreds of points throughout the United States to Little Rock, we did not survey the inbound traffic

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which would be subject to diversion. However, in my opinion, the volume of inbound tickets would be substantially the same as outbound. Therefore, the total annual passenger revenues subject to diversion would equal $1,267,820. In my opinion, fifty percent of these passenger revenues or $633,910 would be diverted should this application be granted.

We did not conduct a study to determine the amount of package express which would be subject to diversion by a grant of this authority. Although approval of this application would drastically improve Greyhound's competitive posture in Little Rock, Greyhound is able to handle today package express moving between the points involved. Therefore, it would be impossible for protestants to determine, with any degree of accuracy, the amount of package express traffic which would be diverted as a result of approval of this application. I am sure that if this application is approved, Arkansas Motor Coaches will lose package express business to Greyhound. However, to assure that the revenue loss that Arkansas will suffer is reflected in a fair and conservative manner, only revenue from lost passenger sales has been considered herein.

The grant of this application would totally duplicate service which is already being provided by Arkansas Motor Coaches and which is adequate and satisfactory to meet the public needs. The grant of this application would result in a diversion of traffic and revenues from protestants to the detriment of the travelling and shipping public. In my opinion, little or no cost savings could be achieved following this traffic diversion. As a result the loss of $633,910 would flow to the "bottom line" of Arkansas, further worsening its existing financial situation.

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VIII. *Argument.*

In its verified statement, Greyhound attempts to portray this application as one which is minor in scope. This is not the case. Currently, Greyhound serves Little Rock as a "stub" to its existing route via Pine Bluff. As a result, approval of this application would permit Greyhound to substantially improve its competitive situation in Little Rock, especially with regard to the transportation of passengers. Although Greyhound does serve Little Rock today, approval of the instant application would be very similar to placing Greyhound in a new market inasmuch as it would substantially improve its route structure through Little Rock.

To allow Greyhound to improve its competitive position in Little Rock would adversely affect the existing service of Arkansas over that route. The service currently being rendered by Arkansas is adequate to meet the desires of the bus passengers and the shipping public.

The verified statements attached in support of this application offer no probative evidence of a need for the service requested by Greyhound and warrant no indepth review. The statements are merely vague, generalized, and virtually identical statements which express some type of preference for the service offered by Greyhound. Although a few of the statements mention that the witness utilizes or has utilized the services of Trailways, either for passenger transportation or for the trans-

portation of express, not a single passenger witness offers any substantive criticism of the service that is offered by Trailways. In fact, 34 of the statements, approximately 75% of all the statements submitted, fail to mention Trailways in any respect. Most of the passenger witnesses indicate that Greyhound has satisfactorily served their transportation needs

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for many years and that the granting of this application would only add some amount of convenience to their trip. This kind of support is insufficient to warrant a grant of authority in an important application such as this.

The vast majority of passenger witnesses supporting this application travel infrequently. Further, a review of their statements indicate that they are so similar as to be without probative value. Essentially, the only questions on the preprinted forms which are answered differently are the number of trips made each year and the names of the points visited. Otherwise, the answers are so similar as to have little meaning. As noted above, the statements, similar as they may be, say nothing about inadequate existing service from Trailways. It can only be concluded that Trailways' service is, in fact, adequate and satisfactory. Further, since many of these witnesses indicate that Greyhound has served them satisfactorily, it can also be concluded that those witnesses have no real need for the new service proposed by Greyhound. Either the service that they have been receiving from Greyhound is satisfactory, or they have not attempted to improve their service by utilizing Trailways, or they have used Trailways and that service has been perfectly satisfactory. No matter how these supporting statements are considered, they do not establish a need for the service proposed. It is questionable whether they even establish a preference for that service.

Should this application be granted, Arkansas would suffer a substantial diversion of its revenues of at least $633,000. Attached as Appendix F is Arkansas' Income Statement for

the 12 month period ending December 31, 1978, which reflects that in 1978 Arkansas had

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a net income of only $218,722. Any diversion of revenues would have a disastrous impact on Arkansas' ope ations between the involved points. Arkansas has invested large amounts of money in advertising, marketing, terminals, equipment, and personnel to establish its operations in the State of Arkansas. The public convenience and necessity do not require the grant of this application.

Additionally, the grant of this application would adversely impact on the other protestants in this proceeding, who operate in through bus service utilizing bus pools with Arkansas serving thousands of points throughout the United States. Passenger and express revenues would be diverted from their operations if Greyhound were allowed to serve between the points involved in this application and the hundreds of other nationwide points which Greyhound is currently authorized to serve, particularly in the western part of the United States.

The Commission must take cognizance of the fact that Greyhound is the dominant carrier in the industry, with Trailways a distant second. Greyhound already directly controls more than 60% of the intercity passenger market. Trailways has 20% of the market. In no other area of transportation is one carrier as dominant as Greyhound is in the bus industry. This application is an attempt by the giant of the industry to become even larger at the expense of Trailways, the only carrier that can offer any meaningful competition to this giant.

It is clear from a review of the support for this application that Greyhound has failed to establish that approval of an application is required by the public convenience and necessity. It is equally clear that competition will not be improved through a grant of the

authority sought. On the contrary, competition will be harmed for it will enable the dominant carrier, Greyhound, to grow larger at the expense of the competitor, Trailways.

This is not the time for the Commission to award *any* new authority to Greyhound. Although approval of this application alone will probably not cause the downfall of the entire Trailways system, approval will harm the Trailways system. Further, approval of this application, together with approval of the many other applications which Greyhound has pending, may spell the loss of the only viable competitor to Greyhound. The Commission has allowed Greyhound to become a giant. It should not allow it to grow any larger through the granting of yet more operating authority. The granting of yet more operating authority allowing Greyhound to further expand its already massive route structure will discourage all small carriers from attempting to grow and compete with Greyhound.

In conclusion, I respectfully request that the Interstate Commerce Commission deny this application in its entirety. Arkansas Motor Coaches is providing, in my opinion, adequate regularly scheduled operations serving Little Rock. A grant of this application would enable the Applicant to divert much needed revenues from Arkansas. Such a diversion would seriously hamper the ability of this carrier to continue to provide the quality and quantity of regular route service as is currently provided.

Respectfully submitted,

_____

Malcolm Myers
Vice President of Traffic
Trailways, Inc.

VERIFICATION

STATE OF TEXAS X
X
COUNTY OF DALLASX

Malcolm Myers, being first duly sworn on oath, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the same are true and correct as stated.

_____
Malcolm Myers

SUBSCRIBED AND SWORN To before me, a notary public in and for Dallas County, Texas, this _____ day of _____, 1979.

_____
Notary Public

_____
My Commission Expires:

STATUTES

Administrative Procedure Act, 5 U.S.C. §§553, 706

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(a) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Interstate Commerce Act, 49 U.S.C.

§ 10922. Certificates of motor and water common carriers

(a) Except as provided in this section and section 10930(a) of this title, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title as a motor common carrier of passengers or water common carrier, respectively, if the Commission finds that—

(1) the person is fit, willing, and able—

(A) to provide the transportation to be authorized by the certificate; and

(B) to comply with this subtitle and regulations of the Commission; and

(2) the transportation to be provided under the certificate is or will be required by the present or future public convenience and necessity.

(b)(1) Except as provided in this section, the Interstate Commerce Commission shall issue a certificate to a person authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title as a motor common carrier of property if the Commission finds—

(A) that the person is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commission; and

(B) on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need;

unless the Commission finds, on the basis of evidence presented by persons objecting to the issuance of a certificate, that the transportation to be authorized by the certificate is inconsistent with the public convenience and necessity.

(2) In making a finding under paragraph (1) of this subsection, the Commission shall consider and, to the extent applicable, make findings on at least the following:

(A) the transportation policy of section 10101(a) of this title; and

(B) the effect of issuance of the certificate on existing carriers, except that the Commission shall not find diversion of revenue or traffic from an existing carrier to be in and of itself inconsistent with the public convenience and necessity.

(3) The Commission may not make a finding relating to public convenience and necessity under paragraph (1) of this subsection which is based upon general findings developed in rulemaking proceedings.

(4) The provisions of paragraph (1) of this subsection (other than subparagraph (A)) shall not apply to applications under this subsection for authority to provide—

(A) transportation to any community not regularly served by a motor common carrier of property certificated under this section;

(B) transportation services which will be a direct substitute for abandoned rail service to a community if such abandonment results in such community not having any rail service and if such application is filed within 120 days after such abandonment has been approved by the Commission;

(C) transportation for the United States Government of property other than used household goods, hazardous or secret materials, and sensitive weapons and munitions;

(D) transportation of shipments weighing 100 pounds or less if transported in a motor vehicle in which no one package exceeds 100 pounds; and

(E) transportation by motor vehicle of food and other edible products (including edible byproducts but excluding alcoholic beverages and drugs) intended for human consumption, agricultural limestone and other soil conditioners, and agricultural fertilizers if—

(i) such transportation is provided with the owner of the motor vehicle in such vehicle, except in emergency situations; and

(ii) after issuance of the certificate, such transportation (measured by tonnage) does not exceed, on an annual basis, the transportation provided by the motor vehicle (measured by tonnage) which is exempt from the jurisdiction of the Commission under section 10526(a)(6) of this title and the owner of the motor vehicle certifies to the Commission annually that he is complying with the provisions of this clause and provides to the Commission such information and records as the Commission may require.

(5) Notwithstanding any other provision of law, any carrier holding authority under paragraph (4)(D) of this subsection operating one or more commercial motor vehicles with a gross vehicle weight rating of 10,000 pounds or more shall be subject to commercial motor vehicle safety regulations promulgated by the Secretary of Transportation pursuant to this title with respect to its entire operations, including the operations of commercial motor vehicles with gross vehicle weight ratings less than 10,000 pounds.

(6) The Commission shall streamline and simplify, to the maximum extent practicable, the process for issuance of certificates to which the provisions of paragraph (4)(E) of this subsection apply.

(7) No motor common carrier of property may protest an application to provide transportation filed under this subsection unless—

(A)(i) it possesses authority to handle, in whole or in part, the traffic for which authority is applied;

(ii) it is willing and able to provide service that meets the reasonable needs of the shippers involved; and

(iii) it has performed service within the scope of the application during the previous 12-month period or has, actively in good faith, solicited service within the scope of the application during such period;

(B) it has pending before the Commission an application filed prior in time to the application being considered for substantially the same traffic; or

(C) the Commission grants leave to intervene upon a showing of other interests that are not contrary to the transportation policy set forth in section 10101(a) of this title.

(8) No motor contract carrier of property may protest an application to provide transportation filed under this subsection.

(9) Notwithstanding the provisions of paragraph (4) of this subsection, the provisions of paragraph (1) of this subsection (other than subparagraph (A)) shall not apply to applications under this subsection for authority to provide transportation for the United States Government of used household goods which transportation is incidental to a pack and crate service on behalf of the Department of Defense.

(c) A person must file an application with the Commission for a certificate to provide transportation as a motor common carrier or water common carrier. The Commission may approve any part of the application or deny the application. The application must—

(1) be under oath;

(2) contain information required by Commission regulations; and

(3) be served on persons designated by the Commission.

(d)(1) Subject to section 10927(a) of this title, each certificate issued to a person to provide transportation as a motor common carrier shall specify—

(A) the transportation to be provided by the carrier;

(B) any of the regular routes over which, any of the places between which, and off-route places at which, the carrier may provide transportation; and

(C) if transportation is not over regular routes or between specified places, the area in which the carrier may provide transportation.

(2) Under regulations of the Commission, a motor common carrier may occasionally deviate from the regular routes, or the places specified in the certificate, or both.

(3) If a motor common carrier transports passengers, the Commission may authorize transportation of the passengers only over a regular route and between specified places, except to the extent the carrier is authorized to provide special or charter transportatio

(4) A certificate of a motor common carrier to transport passengers may include authority to transport—

(A) newspapers, baggage of passengers, express, or mail in the same motor vehicle with the passengers; and

(B) baggage of passengers in a separate motor vehicle.

(e) Each certificate issued to a person to provide transportation as a water common carrier shall specify each route over which, and each port between which, the carrier may provide transportation.

(f)(1) A motor common carrier may provide transportation under a certificate only if the carrier complies with conditions the Commission finds are required by public convenience and necessity, including conditions—

(A) on extending routes of the carrier; and

(B) to carry out requirements established by the Commission under this subtitle.

(2) The Commission may prescribe necessary conditions under which a water common carrier provides transportation, including conditions on extending routes of the carrier.

(3) The Commission may prescribe conditions when the certificate is issued and at any time thereafter. The Commission may not prescribe a condition preventing—

(A) A motor common carrier or water common carrier from adding to its equipment and facilities or its transportation within the scope of the certificate to satisfy business development and public demand; or

(B) a water common carrier, if the carrier has authority to provide transportation over completed parts of a waterway project authorized under law, from extending its transportation over the uncompleted parts of the project when opened for navigation to satisfy business development and public demand.

(g) A certificate issued under this section does not confer a proprietary or exclusive right to use the public highways or public waterways.

(h)(1) Not later than 180 days after the date of enactment of this subsection, the Commission shall—

(A) eliminate gateway restrictions and circuitous route limitations imposed upon motor common carriers of property; and

(B) implement, by regulation, procedures to process expeditiously applications of individual motor carriers of property seeking removal of operating restrictions in order to—

(i) reasonably broaden the categories of property authorized by the carrier's certificate or permit;

(ii) authorize transportation or service to intermediate points on the carrier's routes;

(iii) provide round-trip authority where only one-way authority exists;

(iv) eliminate unreasonable or excessively narrow territorial limitations; or

(v) eliminate any other unreasonable restriction that the Commission deems to be wasteful of fuel, inefficient, or contrary to the public interest.

(2) The regulations promulgated by the Commission pursuant to paragraph (1)(B) of this subsection shall provide for final Commission action upon an application not later than 120 days after the date the application is filed with the Commission, except that in extraordinary circumstances, the Commission may extend such deadline for a period of not to exceed 90 additional days. Such regulations shall also provide for notice and the opportunity for interested parties to comment, but need not provide for oral evidentiary hearings. In granting or denying applications under paragraph (1)(B) of this subsection, the Commission shall (A) consider, among other things, the impact of the proposed restriction removal upon the consumption of energy resources, potential cost savings and improved efficiency, and the transportation policy set forth in section 10101(a) of this title, and (B) give special consideration to providing and maintaining service to small and rural communities and small shippers.

(i) A person holding (1) a certificate issued under subsection (b) of this section to provide transportation as a motor common carrier of property, and (2) a permit issued under section 10923 of this subchapter to provide transportation as a motor contract carrier of property, may transport property under the certificate in the same motor vehicle and at the same time as property under the permit.

(j) A motor common carrier of property may deliver to or receive from a rail carrier a trailer moving in trailer-on-flat-car service at any point on the route of the rail carrier if the motor carrier is authorized to serve the origin and destination points of the traffic.

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ALEXANDER L. STEVAS,

No. 82-120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GREYHOUND LINES, INC.,

Petitioner,

v.

TRAILWAYS, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF RELATING TO A CHANGE IN APPLICABLE LAW

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No. 82-120

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OCTOBER TERM, 1982

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v.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF RELATING TO A CHANGE IN APPLICABLE LAW

Preliminary Statement

Petitioner, Greyhound Lines, Inc. ("Greyhound"), pursuant to Rule 22(6), submits this Supplemental Brief to advise the Court that since the petition for a writ of certiorari was filed herein, the "Bus Regulatory Reform Act of 1982," P.L. 97-261, 96 Stat. 1102 ("BRRA") has become law.* The BRRA makes fundamental and radical changes in the law applicable to motor carriers of passsengers (which had been governed by provisions of the Motor Carrier Act of 1935 ("1935 Act") which the District of Columbia Circuit construed and applied in the judgment and opinion sought to be reviewed) among them the reduction of entry barriers, including for existing bus companies seeking to expand their services.

Under the BRRA, Greyhound's applications for new and expanded services are subject to the same procedural and substantive standards as are those of other carriers. Congress considered

* The BRRA was signed September 20, 1982; its effective date is November 19, 1982. BRRA §31(a). Excerpts from the BRRA appear in a Supplemental Appendix.

industry structure, and was urged by respondent Trailways, Inc. ("Trailways") to treat Greyhound's applications as unique and requiring different treatment. Congress in legislating uniform standards clearly rejected such proposals.

The Interstate Commerce Commission ("ICC") is developing regulations and interpretations to effectuate the provisions and purposes of the BRRA, and has issued a notice of proposed rulemaking in Ex Parte No. 55 (Sub-No. 56), *Applications for Operating Authority—Motor Passenger Carriers*, 47 Fed. Reg. 42934 (Sept. 29, 1982).

It is thus singularly appropriate for the Court to grant the writ, vacate the judgment and opinion sought to be reviewed, and remand this matter to the District of Columbia Circuit with a direction to remand to the ICC with a simple instruction to make such disposition thereof as the ICC deems appropriate in light of the changes in applicable law effected by the BRRA.

I. THE CHANGES EFFECTED BY THE BRRA IN PRIOR LAW REMOVE WHATEVER STATUTORY BASES THERE WERE FOR THE JUDGMENT AND OPINION OF THE COURT BELOW

The BRRA is the latest in a series of acts substantially deregulating most aspects of transportation. The BRRA reflects changes in the economic conditions for passenger carriers, in economic policy and in regulatory philosophy. It makes a sharp and explicit break with the regime of pervasive state and federal regulation which developed in the aftermath of the 1935 Act, and marks a profound shift to reliance on competitive market forces.

A. Statutory Changes

Prior law required the ICC affirmatively to find that "the transportation to be provided under the certificate is or will be *required* by the present or future *public convenience and necessity*," 49 U.S.C. §10922(a)(2) (emphasis added). Pet. 2-3.* This was the provision characterized in the District of Columbia Circuit's opin-

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* References to pages in the Supplemental Appendix are shown as "S.A.__," to those in the Petition as "Pet. __" and to those in its Appendix as "App.__."

ion as the principal limitation on the ICC's discretion to grant a carrier's route applications. App. 7. BRRA 6(a) deletes references to motor carriers of passengers from 49 U.S.C. §10922(a), and thereby deletes for them the "public convenience and necessity" test. S.A. 3. BRRA 6(b) then adds a new subsection 49 U.S.C. §10922(c), which reads in pertinent part:

"(c) (1) Except as provided in this section—

"(A) The Commission shall issue a certificate to a person authorizing that person to provide regular-route transportation . . . as a motor common carrier of passengers . . . if the Commission finds that the person is fit, willing and able to provide the transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commission, unless the Commission finds, on the basis of evidence presented by any person objecting to the issuance of the certificate, that the transportation to be authorized is not consistent with the public interest.

* * *

"(3) In making any findings relating to public interest under paragraphs (1)(A) and (2)(B) of this subsection, the Commission shall consider, to the extent applicable—

"(A) the transportation policy of section 10101(a) of this title;

"(B) the value of competition to the traveling and shipping public.

"(C) the effect of issuance of the certificate on motor carrier of passenger service to small communities; and

"(D) whether issuance of the certificate would impair the ability of any other motor common carrier of passengers to provide a substantial portion of the regular-route passenger service which such carrier provides over its entire regular-route system; except that diversion of revenue or traffic from a motor common carrier of passengers in and of itself shall not be sufficient to support a finding that issuance of the certificate would impair the ability of the carrier to provide a substantial portion of the

> regular-route passenger service which the carrier provides over its entire regular-route system." S.A. 3–4.

These amendments materially change applicable law to liberalize entry by requiring persons opposing entry to show inconsistency with the public interest, for which showing evidence of diversion of revenues is insufficient of itself. Any distinction based on the size or identity of either applicant or protestant has been rejected.

B. Legislative Purpose

Although the material changes in applicable law appear clearly from the provisions quoted above, statements of the legislative purpose appearing both in the statute (BRRA §§2,3, S.A. 1–2) and in committee reports underscore the magnitude of the changes. In adopting the Senate version, the report of the Conference Committee makes clear that the entry provisions of the new statute (BRRA §6, S.A 3–6) will expedite and weigh the scales in favor of entry:

> ". . . First, the new evidentiary standard ('consistent with' rather than 'required by') will expedite the substantive analysis of the application. Second, *the provision creates a presumption that the grant of the application is consistent with the public interest.* This means that the burden will be on any protestant to provide sufficient evidence to negate the presumption of consistency." *Joint Explanatory Statement of the Committee of Conference, Bus Regulatory Reform Act of 1982*, H.R. Rep. No. 97-780, 97th Cong., 2d Sess. 36 (Aug. 19, 1982), *reprinted in* 128 Cong. Rec. H 6674, H 6684 (Aug. 19, 1982). (Emphasis supplied.)

The report which accompanied the Senate version provides a more expanded guide to the legislative purpose. *Senate Comm. on Commerce, Science, and Transportation, Bus Regulatory Reform*, S. Rep. No. 97-411, 97th Cong., 2d Sess. (May 20, 1982) ("Senate Report"). The Senate Report leaves no doubt that all carriers are subject to uniform, liberalized entry standards, and may expand their services:

> "*Section 3. Congressional findings*
>
> "The findings highlight the importance of a sound and

competitive bus industry and the need for that industry to meet the transportation needs of the citizens of this country. It is emphasized that the existing Federal and State regulatory structure has tended to impair, in certain circumstances, the ability of carriers to enter markets and to maximize use of equipment and opportunities to expand. The Committee finds that this overly protective regulation has caused diminished price and service competition. The ICC is given explicit direction to reduce regulation and to do everything possible to promote competition in the industry. It is through greater competition and reduced regulation that the goals of the national transportation policy can be best achieved." Senate Report 13.

* * *

"*Section 6. Motor carrier of passengers entry policy.*

"Section 6 of the bill adds a new subsection to section 10922 of title 49, United States Code, to govern applications for authority to operate as motor common carriers of passengers. The purpose of this subsection is to significantly reduce entry barriers for all forms of intercity bus service and to permit existing bus companies to expand their services and to provide more efficient interstate and intrastate services." Senate Report 15.

* * *

"This last test, impairment, is a systemwide test. The existing carrier must show that the proposed service will impair its ability to provide a substantial portion of its regular route service. In meeting this test a protestant would be required to establish that granting of the application would materially jeopardize its ability to continue operating a substantial portion of its entire regular route system. The 'entire regular route system' applies to any bus company and its subsidiaries and affiliates. The Committee believes that the public interest test can be an important tool in insuring that small community service and commuter bus service are not adversely affected by the eased entry standards in the bill. This factor, however, is not intended to undercut or undermine the basic policy objectives of new subsection 10922(c) to ease entry into the intercity bus industry. In fact, it should be noted that this impairment standard is only one of four

factors to be considered by the ICC in making its public interest determination. The other factors, including the value of competition, are to be given equal consideration by the ICC. . . . There is no reason to expect that motor carriers of passengers offering satisfactory and adequate services to satisfied customers would immediately upon the introduction of new service lose those passengers to the new carrier. The Committee wishes to emphasize that the *paramount consideration is the benefit derived by the public and not the protection of carriers. The success or failure of a carrier should be determined in the marketplace and not in the regulatory arena.*" Senate Report 17-18. (Emphasis supplied.)

C. Congressional Consideration of Bus Industry Structure and Alternatives to Uniform Entry Standards

In its opinion below, the District of Columbia Circuit spoke of an "in-depth study of the competitive structure of the intercity bus market to which an adjudicatory-type proceeding may not normally be conducive" (App. 18) and also observed "[t]he breadth of what on remand should be a careful examination of market structure and impact may prompt the Commission to permit the parties to introduce broad legislative-type evidence relevant to the issue of the overall impact of Greyhound authority over Trailways' operations" (App. 20). Since the opinion below was written, however, Congress has conducted just such an "in-depth study," and on that basis has authoritatively formulated transportation policy.

Congress heard "broad legislative-type evidence" from interested agencies, including the Department of Justice, the Federal Trade Commission and the ICC, and from carriers, including petitioner and Trailways, and considered the studies, views and recommendations of witnesses and staff, including Trailways' arguments for entry provisions discriminating against Greyhound.* Congress confronted

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* *See Bus Regulatory Reform: Hearings Before the Subcommittee on Surface Transportation of the Committee on Public Works and Transportation on H.R. 3662 and H.R. 3663*, 97th Cong., 1st Sess. 57-82, 136-68, 307-42 (Serial No. 97-17 June 3, 1981) (*see* 314-15, 318-20, 322-27 [especially 324-25], 327-31, 334, 337, 340-41 for statements and testimony of Theodore Knappen, Senior Vice President, Trailways, Inc. and of William L. McCracken, Senior Vice President, Greyhound Lines, Inc.). *See also Deregulation of the Intercity Bus Industry: Hearing Before the Subcommit-*

significant competitive issues, including industry structure and what changes should be made in entry procedures, and, having made its judgment among the policy choices and arguments presented, enacted the BRRA.**

Congress addressed itself to the structural and competitive issues that concerned the District of Columbia Circuit below. Reviewing the historical development of the bus and trucking industries, the Senate observed:

> "Federal regulation of the trucking and bus industries was shaped to a significant degree by the economic conditions prevailing in the 1930s. . . .
>
> "It was a 'sign of the times' that falling prices and business failures should be linked, with excessive competition being held responsible for both conditions. . . .
>
> "Today, economic conditions are much different. . . . Competition is no longer viewed as a detriment to the stability of our national economy. Quite to the contrary, it is now considered an aid to economic stability. . . .
>
> * * *
>
> "The two industries also differ basically in their competitive structures. In the intercity bus industry, the two largest firms accounted for more than 80 percent of the Class I intercity industry revenues in 1980. No sector of the trucking industry is as concentrated. And, while poor marketplace performance is not an automatic consequence of such revenue concentra-

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tee on Surface Transportation of the Committee on Commerce, Science, and Transportation on H.R. 3663, 97th Cong., 2d Sess. 66-116, 150-90, 226-37 (Serial No. 97-100 March 8, 1982) (*see* 167-79 [especially 176], 185-90 and 226-32) for their testimony, statements and supplementary statements). The statements of Trailways before Congress raised the same issues as the unsworn comments of its counsel in an ICC proceeding, Ex Parte No. MC-133, *Entry Flexibility—Regular-Route Passenger Service*, and it is no longer appropriate or necessary for the ICC to consider them in connection with Greyhound's Little Rock application.

** The BRRA, moreover, provides that the ICC may not decide entry applications on the basis of general findings in rulemaking proceedings, rather than in case-by-case adjudications. BRRA §6(b), adding new 49 U.S.C. §10922(c)(5), S.A. 5; Senate Report 18. That prohibition extends to receipt here of submissions from rulemaking proceedings such as those referred to by the District of Columbia Circuit (App. 20) and to suggestions of that court that the ICC make in this instance an "in-depth study" of the industry and its competitive structure (App. 18).

tion in the bus industry, the special competitive structure of that industry must be addressed in any consideration of regulatory reform.

"The competitive environment in which the bus industry must operate also sets it apart. . . .

"The automobile has provided especially strong competition, although the bus industry has had its revenues drained by airline and train services as well. Airline regulatory reform has [intensified] the competition for bus passengers, and Amtrak is providing further [competition] to the bus industry on certain important corridor routes.

* * *

"Statistics reveal the predominance of Greyhound Lines, Inc., and its subsidiaries in the overall intercity bus market. However, if one is to view that market in proper perspective, it is also necessary to consider the National Trailways Bus System's coordinated network of transcontinental bus service. The network is basically an alliance of bus companies comprised of Trailways, Inc., its controlled subsidiaries, and about 47 independent bus companies.

* * *

"After reviewing this history and the current regulatory climate, the Committee reached the position that reforms were required. . . .

"The reforms, which are set forth in detail in the section-by-section analysis, establish a new regulatory scheme at the Federal level. . . ." Senate Report 2-5.

It should no longer be necessary or even appropriate for the ICC to conduct any more studies of the bus industry.* It should now be sufficient that the ICC, as the agency entrusted with implementation of the new law, have an opportunity to effectuate all of its terms and purposes, without the distraction of the observations, instructions and suggestions contained in the judgment and opinion below, which were made prior to the change in the law.

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* The BRRA also expresses Congressional hostility toward such uneconomic limitations on carrier authority as "closed-door" restrictions similar in effect to the limitations on Greyhound's Little Rock service. BRRA §7, adding new 49 U.S.C. §§10922(j)(3), (4), S.A. 6-7.

II. ONCE THERE IS A CHANGE IN THE APPLICABLE LAW UNDER WHICH THE ACTIONS OF THE ICC WERE REVIEWED BELOW, THE OUTCOME OF THAT PRIOR REVIEW CAN NO LONGER STAND AND REMAND TO THE IMPLEMENTING AGENCY IS IN ORDER

When, as in this instance, applicable law changes before the process of adjudication has been completed, neither this Court nor those courts and agencies subject to its review should continue to proceed as though no change had occurred. As this Court has observed, "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). The Court should, as it has in the past, grant certiorari, vacate the judgment, and remand the case for disposition in light of the new law. *Costle v. Republic Steel Corp.*, 434 U.S. 1030 (1978); *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23 (1940).* As of the effective date, less than 60 days from now, the ICC will be authorized to apply to route applications the very different entry standards of this reform legislation. *See* new 49 U.S.C. §§10922(c)(1)(A), (3), (5). S.A. 3–5.**

Such action by this Court could not possibly result in "manifest injustice" to anyone, including respondents. On the contrary, if the ICC considered Greyhound's Little Rock application on a basis different from that of all other applications, in clear opposition to the will

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* Where the law changed after certiorari was granted or probable jurisdiction was noted, the Court has also vacated the judgment and remanded the case. *Beltran v. Meyers*, 451 U.S. 625 (1981); *Fusari v. Steinberg*, 419 U.S. 379 (1975). *See also* the remand in *Public Service Commission v. Federal Power Commission*, 361 U.S. 195, 197 (1959). Remand to the ICC will conserve judicial resources as well as encourage early implementation of the regulatory reforms sought by Congress.

** If the Court decides this petition before the effective date, it should still apply the new law. In *Beltran v. Meyers*, *supra*, the Court found it inappropriate to decide the case under the old statute when an amendment which changed the law was about to take effect in six weeks. In *Bradley*, *supra*, the Court, interpreting *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268 (1969), observed that "even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." 416 U.S. at 715. No statutory direction or legislative history supports any other result or suggests that the BRRA should not be applied to pending cases such as this.

of Congress, that would entail "manifest injustice" to Greyhound and to the public.* An interpretation which would restrict the benefits of the BRRA by restricting its provisions to applications filed after the effective date would be clearly inconsistent with its purposes.

CONCLUSION

Because the recently enacted Bus Regulatory Reform Act of 1982 makes a material and fundamental change in the applicable law governing the subject matter of this petition, the Court should grant certiorari, vacate the judgment below, and remand the case to the District of Columbia Circuit with a direction to remand to the ICC with a simple instruction to make such disposition thereof as the ICC deems appropriate in light of that Act.

Dated: Washington, D.C.
September 30, 1982

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* Nothing in the application of the BRRA to this matter gives rise to concerns such as those voiced in *Greene v. United States*, 376 U.S. 149 (1964), the example given in *Bradley*, 416 U.S. at 716-17, of "manifest injustice." In this case, what is involved are not rights to restitution for wrongs committed in the past, but rather the appropriate disposition the ICC should now make of an application to serve future transportation needs in light of the BRRA.

Supplemental Appendix

BUS REGULATORY REFORM ACT OF 1982
– Excerpts –

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Bus Regulatory Reform Act of 1982".

PURPOSE OF THE ACT

SEC. 2. This Act is part of the continuing effort by Congress to reduce unnecessary and burdensome Government regulation.

CONGRESSIONAL FINDINGS

SEC. 3. The Congress hereby finds that a safe, sound, competitive, and fuel-efficient motor bus system contributes to the maintenance of a strong national economy and a strong national defense and is vital to the transportation needs of the elderly, handicapped, and the poor; that the statutes governing Federal regulation of the motor bus industry are outdated and must be revised to reflect the future transportation needs and realities; that historically the existing Federal and State regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the motor bus industry; that State regulation of the motor bus industry has, in certain circumstances, unreasonably burdened interstate commerce; that overly protective regulation has resulted in operating inefficiencies and diminished price and service competition in the motor bus industry; that the objectives contained in the national transportation policy can best be achieved through greater competition and reduced regulation; that in order to reduce the uncertainty felt by the Nation's motor bus industry and those persons and communities that rely on its services, the Interstate Commerce Commission

should be given explicit direction for reduced regulation of the motor bus industry and should do everything within its power to promote competition in the motor bus industry; and that legislative and resulting changes should be implemented without unnecessary disruption to the transportation system consistent with the scope of the reforms enacted.

* * * * * *

NATIONAL TRANSPORTATION POLICY

SEC. 5. Subsection (a) of section 10101 of title 49, United States Code, is amended by striking out "and in regulating those modes" and all that follows through the period at the end of such subsection and inserting in lieu thereof the following: "and—

"(1) in regulating those modes—

"(A) to recognize and preserve the inherent advantage of each mode of transportation;

"(B) to promote safe, adequate, economical, and efficient transportation;

"(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

"(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

"(E) to cooperate with each State and the officials of each State on transportation matters; and

"(F) to encourage fair wages and working conditions in the transportation industry;

"(2) in regulating transportation by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, passengers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public; (C) allow the most productive use

of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers and intrastate bus services; (F) provide and maintain commuter bus operations; (G) improve and maintain a sound, safe, and competitive privately owned motor carrier system; (H) promote greater participation by minorities in the motor carrier system; and (I) promote intermodal transportation; and

"(3) in regulating transportation by motor carrier of passengers (A) to cooperate with the States on transportation matters for the purpose of encouraging the States to exercise intrastate regulatory jurisdiction in accordance with the objectives of this subtitle; (B) to provide Federal procedures which ensure that intrastate regulation is exercised in accordance with this subtitle; and (C) to ensure that Federal reform initiatives enacted by the Bus Regulatory Reform Act of 1982 are not nullified by State regulatory actions.".

MOTOR CARRIER OF PASSENGERS ENTRY POLICY

SEC. 6. (a) Subsection (a) of section 10922 of title 49, United States Code, is amended (1) by striking out "II or", and (2) by striking out "motor common carrier of passengers or water common carrier, respectively," and inserting in lieu thereof "water common carrier".

(b) Section 10922 of title 49, United States Code, is amended by redesignating subsections (c), (d), (e), (f), (g), (h), (i), and (j) (and any references thereto) as subsections (d), (e), (f), (g), (h), (i), (j), and (k), respectively, and by inserting after subsection (b) the following new subsection:

"(c) (1) Except as provided in this section—

"(A) The Commission shall issue a certificate to a person authorizing that person to provide regular-route transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title as a motor common carrier of passengers and shall

issue a certificate to a recipient of governmental financial assistance for the purchase or operation of buses, or to an operator for such a recipient, authorizing that person to provide transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title as a motor common carrier of passengers, if the Commission finds that the person is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this subtitle and regulations of the Commission, unless the Commission finds, on the basis of evidence presented by any person objecting to the issuance of the certificate, that the transportation to be authorized is not consistent with the public interest.

* * * * * * *

"(3) In making any findings relating to public interest under paragraphs (1) (A) and (2) (B) of this subsection, the Commission shall consider, to the extent applicable—

"(A) the transportation policy of section 10101(a) of this title;

"(B) the value of competition to the traveling and shipping public;

"(C) the effect of issuance of the certificate on motor carrier of passenger service to small communities; and

"(D) whether issuance of the certificate would impair the ability of any other motor common carrier of passengers to provide a substantial portion of the regular-route passenger service which such carrier provides over its entire regular-route system; except that diversion of revenue or traffic from a motor common carrier of passengers in and of itself shall not be sufficient to s pport a finding that issuance of the certificate would impair the ability of the carrier to provide a substantial portion of the regular-route passenger service which the carrier provides over its entire regular-route system.

"(4) The provisions of paragraph (1) of this subsection relating to the Commission finding that transportation to be authorized by issuance of a certificate is not consistent with the public interest shall not apply to any application under this subsection for authority to provide—

"(A) interstate transportation service to any community not regularly served by a motor common carrier of passengers under this section;

"(B) interstate transportation service which will be a substitute for discontinued rail or commercial air passenger service to a community if such discontinuance results in such community not having any rail and commercial air passenger service and if such application is filed within 180 days after such discontinuance becomes effective; and

"(C) interstate transportation service to any community with respect to which the only motor common carrier of passengers providing interstate transportation service to such community applies for authority to discontinue providing such interstate service under section 10925(b) of this subchapter or applies for permission to discontinue or reduce its level of intrastate service to such community under section 10935 of this subchapter.

"(5) The Commission may not make any finding under paragraphs (1) and (2) of this subsection which is based upon general findings developed in rulemaking proceedings.

"(6) The requirement that persons issued certificates under this subsection be fit, willing, and able means safety fitness and proof of minimum financial responsibility under section 18 of the Bus Regulatory Reform Act of 1982.

"(7) No motor common carrier of passengers may protest an application to provide transportation filed under this subsection or a request to remove an operating restriction under section 10922(i) (4) of this title unless—

"(A) (i) it possesses authority to handle, in whole or in part, the traffic for which authority is applied;

"(ii) it is willing and able to provide service that meets the reasonable needs of the traveling public; and

"(iii) it has performed service within the scope of the application during the previous 12-month period or has, actively in good faith, solicited service within the scope of the application during such period;

"(B) it has pending before the Commission an application filed prior in time to the application being considered for substantially the same traffic; or

"(C) the Commission grants leave to intervene upon a showing of other interests that are not contrary to the transportation policy set forth in section 10101(a) of this title.

* * * * * * *

(c) Paragraph (4) of subsection (e) of section 10922 of title 49, United States Code, as redesignated by subsection (b) of this section, is amended to read as follows:

"(4) A certificate of a motor common carrier to transport passengers shall be deemed to include permissive authority to transport newspapers, baggage of passengers, express packages, or mail in the same motor vehicle with the passengers, or baggage of passengers in a separate motor vehicle.".

(d) (1) Section 10102 of title 49, United States Code, is amended by redesignating paragraphs (5) through (29), and any references thereto, as paragraphs (6) through (30), respectively, and by inserting after paragraph (4) the following new paragraph:

"(5) 'commuter bus operations' means short-haul regularly scheduled passenger service provided by motor vehicle in metropolitan and suburban areas, whether within or across the geographical boundaries of a State, and utilized primarily by passengers using reduced-fare, multiple-ride, or commutation tickets during morning and evening peak period operations.".

* * * * * * *

RESTRICTION REMOVAL

SEC. 7. Section 10922(i) of title 49, United States Code, as redesignated by section 6(b) of this Act, is amended by adding at the end thereof the following new paragraphs:

"(3) On the effective date of this paragraph, a certificate to provide interstate transportation of passengers issued under this section shall be deemed to authorize (but not require)—

"(A) round-trip operations where only one-way authority exists; and

"(B) special and charter transportation from all points in a political subdivision of a State in any case in which special and charter transportation authority is limited to one or more points of origin in such political subdivision.

"(4) Upon request of any person issued a certificate to provide interstate transportation of passengers under this section, the Commission shall within 90 days remove any operating restriction imposed on the certificate in order to authorize interstate transportation to intermediate points on any route covered by the certificate unless the Commission finds, on the basis of evidence presented by a person objecting to the removal of such an operating restriction, that the resulting interstate transportation directly competes with a commuter bus operation and will have a significant adverse effect on commuter bus service in the area in which the competing service will be provided.".

* * * * * * *

EFFECTIVE DATE

SEC. 31. (a) Except as provided in subsections (b) and (c) of this section, this Act shall take effect on the 60th day after the date of enactment of this Act.

(b) The amendment made by section 10(e) (4) of this Act shall take effect on October 1, 1982.

(c) The provisions of sections 6(g) and 30 of this Act shall take effect on the date of enactment of this Act.

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ALEXANDER L. STEVAS,
CLERK

No. 82-120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GREYHOUND LINES, INC.,
Petitioner,

v.

TRAILWAYS, INC., *et al.*, and
NATIONAL TRAILWAYS BUS SYSTEM,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the court of appeals, holding arbitrary and capricious the Interstate Commerce Commission's failure to receive evidence relating to and make adequate findings on the issue of the anticompetitive systemwide harm likely to result from a grant of Greyhound's application to provide new intercity bus transportation, merits this Court's review.

LISTING REQUIRED BY RULE 28.1

Trailways, Inc., a privately held corporation, controls twenty wholly owned subsidiaries which have no affiliates. It has partial ownership of the following corporations:

Amarillo Trailways Bus Center, Inc. (50%)
Continental Panhandle Lines, Inc. (50%)
K.G. Lines, Inc. (Preferred, 100%; Common, 50%)
Texas, New Mexico & Oklahoma Coaches, Inc. (38.96%)
Union Bus Station of Oklahoma City (20%)

Trailways' parent, New Trails, Inc., has partial ownership of the following corporations:

Charlotte Union Bus Station, Inc.
(Trailways Southeastern Lines, Inc., 75%)
Service Coach Line, Inc.
(Virginia Stage Lines, Inc., 33⅓%)
(Trailways Tamiami, Inc., 33⅓%)
Trailways Bus Depot of Columbus, Inc.
(Trailways Tennessee Lines, Inc., 25%)
(Trailways Tamiami, Inc., 50%)
Trailways Bus Terminal, Inc.—Richmond
(Virginia Stage Lines, Inc., 50%)
Wilmington Union Bus Station Corporation
(Trailways Southeastern Lines, Inc., 30.46%)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-120

GREYHOUND LINES, INC.,
Petitioner,

v.

TRAILWAYS, INC., *et al.*, and
NATIONAL TRAILWAYS BUS SYSTEM,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This case involves a decision of the United States Court of Appeals for the District of Columbia Circuit holding that the Interstate Commerce Commission ("ICC" or "Commission") failed to make adequate findings to support its decision to grant the application of Greyhound Lines, Inc. ("Greyhound"), for new, direct-bus service to and from Little Rock, Arkansas, over a route served by Arkansas Motor Coaches, Ltd. (now "Trailways Arkansas, Inc."), a Trailways subsidiary.[1] The Little Rock

[1] Trailways, Inc., and its 14 wholly owned bus subsidiaries, together with approximately 49 independent bus companies, constitute the National Trailways Bus System ("NTBS"), which serves 46 states. NTBS intervened in the review proceeding below.

application was one of a series of six applications which, beginning in 1977, Greyhound filed for new regular-route authority involving Trailways' most vulnerable routes.[2]

Respondents Trailways, Inc., *et al.*, filed a protest to the application, and the Commission ordered the submission of written evidence under its modified procedure.[3] In a verified statement, Trailways' Vice President of Traffic testified that traffic diversions resulting from a grant of the application would "seriously harm protestants" (Petitioner's Appendix, hereinafter "Pet. App.," 101), would "adversely impact" other carriers systemwide (Pet. App. 104), and would permit Greyhound—by far the nation's dominant bus carrier—to become larger at the expense of Trailways, its "distant" competitor (Pet. App. 104-05).

On February 8, 1980, a three-member staff review board (one member not participating) issued a decision granting the Greyhound application. Pet. App. 34. The review board found that the involved traffic "constitutes a considerable part of [Trailways] Arkansas' operations" (Pet. App. 39), but held "we are unable to conclude that the potential diversion of this traffic which a grant might precipitate would materially adversely affect either Arkansas or its parent, Trailways" (Pet. App. 39-40).

Trailways petitioned for administrative review by filing timely "exceptions" on March 10, 1980, and subsequently

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[2] On Trailways' motion, the Commission consolidated four of the subject applications (not including Little Rock) for further hearing "with respect to the issues of the structure of the national motorbus industry and Greyhound's dominance of that industry . . . and its competitive structure nationwide." (Joint Appendix to the briefs before the court of appeals, hereinafter "J.A.," 260.) Following an unsuccessful challenge to the Commission's consolidation order (Greyhound Lines, Inc. v. United States, D.C. Cir. Nos. 81-1079, 81-1169, *appeal dismissed*, May 1, 1981), Greyhound unilaterally withdrew the four applications, and the Commission thereupon discontinued the consolidated proceeding.

[3] Virtually all motor carrier licensing cases are handled under this modified procedure, pursuant to which the parties submit written verified statements in lieu of oral testimony. *See* 49 C.F.R. § 1100.251(c) (1981).

tendered a motion to supplement its exceptions with newly available evidence amplifying the impact that a grant of this application would have on Trailways' systemwide operations. J.A. 158.[4]

On June 17, 1980, a three-member Commission panel ("Division 1") issued a final decision which affirmed the review board's grant of Greyhound's application. Pet. App. 30. The Commission specifically held that Trailways' evidence concerning potential anticompetitive systemwide harm "may not be considered, for this issue was not raised prior to the time this proceeding reached the petition stage." Pet. App. 32. In addition, the Commission denied Trailways' request that the Commission take official notice of its comments filed in the pending MC-133 proceeding, holding that the agency "may not give consideration to evidence contained in the records in those proceedings." Pet. App. 31.

On June 27, 1980, Trailways filed a petition for review with the District of Columbia Circuit. A stay pending judicial review was entered by Chief Justice Burger on July 1, 1980 (J.A. 201), but subsequently was vacated on Trailways' own motion when it was learned that the Commission had entered a stay of its decision late that same day (J.A. 309).[5]

In a unanimous decision issued March 16, 1982, the court of appeals found that the Commission's grant of the Greyhound

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[4] In its exceptions, Trailways specifically requested that the Commission take official notice of certain comments which it had recently filed in another pending Commission proceeding—Ex Parte No. MC-133, Petition for Rulemaking on Entry Flexibility for Regular-Route Passenger Service (Pet. App. 77)—involving the competitive structure of the bus industry. J.A. 78. It further requested that the Little Rock application be considered along with the five others previously described as evidence of Greyhound's "continuing movement toward monopolization of the industry by selectively negating or neutralizing advantages held by petitioner [Trailways], its largest rival." Pet. App. 31.

[5] Petitioner incorrectly states the date of Trailways' petition for review as "March 27" (Petition for Writ of Certiorari, hereinafter "Pet.," 5), and ignores the prior involvement of this Court in the proceeding. On September 2, 1980, the Commission lifted its stay (J.A. 210), and on September 16, 1980, a second interim stay previously entered by Chief Justice Burger was vacated and a stay pending judicial review was denied (J.A. 256).

application was arbitrary and capricious because it was "made without sufficient consideration of important relevant issues." Pet. App. 2.

Although the court of appeals was "mindful of the broad expert discretion traditionally lodged in the ICC in considering and ruling on common carrier applications for authority to provide a particular service," it emphasized that this discretion "is not without limits." Pet. App. 7.[6] Although the Commission conceded that it was required to focus on the systemwide effect of competition on Trailways' operations, the court found the Commission's decision was bereft of "articulated explanation" or even "any discussion" of its finding on this issue.

> If the Commission is to be true to its duty in cases of this sort to balance convenience to the applicant and any adverse impact or injury to the public as a whole, the harm inflicted by a monopolist or a near monopolist on a vulnerable competitor, which Trailways claims to be, deserves especially careful attention. It received none in this case. We find in this failure alone sufficient reason to declare the Commission's ultimate conclusions and its decision arbitrary and capricious and to order that this matter be remanded for reconsideration.

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[6] It is the duty of the Commission, the court noted,

> to identify and balance often competing interests in promoting competition, maintaining healthy economic conditions, preserving an adequate existing service, and providing for future needs, and to arrive at a decision that best serves the public interest. It is not for us to say what weight ultimately should be afforded the various elements of the Commission's balance in determining "public convenience and necessity." That is a determination of fact which is the prerogative of the ICC, and it is not this court's role in the administrative arena to dictate an outcome or to reverse an agency's decision simply because we may not agree with it. It is our duty, however, to ensure that the Commission has confronted all relevant—or at least significant—factors necessary to a reasoned decision.

Pet. App. 8 (footnotes omitted).

Pet. App. 18. The court of appeals vacated the order under review and remanded the matter for "deliberations which the Commission deems appropriate to a full consideration of market-related issues, and any others pertinent to the action requested." Pet. App. 23. Greyhound's petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 25-27) was unanimously denied.

SUMMARY OF ARGUMENT

The District of Columbia Circuit found that the ICC failed to make adequate findings with regard to the potential anticompetitive systemwide harm caused by the grant of the Greyhound application. This decision of the court of appeals does not, and indeed could not, give rise to any conflict among the circuits because the court simply found that on the basis of the specific facts presented, the ICC acted arbitrarily and capriciously. The standards employed by the court of appeals in determining whether the agency's decision was based on a consideration of all relevant factors are the same standards announced by this Court, *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 284 (1974); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and utilized in each of the other circuits.

The record clearly supports the decision of the court of appeals that the ICC was plainly wrong in finding that the issue of systemwide anticompetitive harm was not raised before the review board. Similarly erroneous was the Commission's finding that it could not lawfully consider evidence contained in the records of other ICC proceedings. *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946).

Finally, the court of appeals did not infringe upon areas committed to the ICC's discretion. Instead, the court simply required that the agency properly consider on remand long-established standards regarding whether or not the grant of Greyhound's authority would serve the public convenience and necessity.

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT AND THAT OF ANY OTHER COURT

Petitioner broadly alleges the existence of a conflict between this decision of the court of appeals and decisions of the Third,[7] Fifth[8] and Seventh[9] Circuits.[10] Pet. 7-8. In fact, the decision of the court of appeals conflicts with none of the cases referred to by petitioner.[11]

Petitioner alleges that Trailways made these "same contentions" to the ICC in the *Lincoln* proceeding. In *Lincoln*, Trailways did argue that the ICC failed to make adequate findings with regard to the potential harm the grant of a Greyhound application would cause to Trailways on a system-wide level. There, however, unlike the situation in the instant case, the ICC accepted and evaluated all of the evidence

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[7] Trailways, Inc. v. ICC ("Atlantic City"), 659 F.2d 1071 (3d Cir. 1981) *(mem.)*.

[8] Trailways, Inc. v. ICC ("Lincoln"), 676 F.2d 1019 (5th Cir. 1981) (*per curiam*).

[9] Assure Competitive Transp., Inc. v. United States ("Assure II"), 635 F.2d 1301 (7th Cir. 1980).

[10] Petitioner adds the make-weight contention that the decision below conflicts with the District of Columbia Circuit's own decisions in Greyhound Corp. v. ICC, 668 F.2d 1354 (D.C. Cir. 1981), and Greyhound Corp. v. ICC, 551 F.2d 414 (D.C. Cir. 1977). In those cases, Greyhound sought review of ICC orders that refused to rescind prior orders of the Commission that subjected Greyhound's holding company to ICC securities jurisdiction because, at the time of those orders, 80% of Greyhound's total revenues were derived from regulated transportation activities. The court of appeals held that the Commission improperly applied a new test for the continued assertion of its securities jurisdiction to Greyhound. The court of appeals remanded the matter to the Commission for reconsideration in light of the ICC's traditional test for the exercise of its securities jurisdiction, and to give the Commission the opportunity to provide adequate reasons for its departure from its established precedents. These decisions quite obviously do not conflict with the decision of the court of appeals under review.

[11] Petitioner raised these identical arguments in its Petition for Rehearing and Suggestion for Rehearing *En Banc*, filed April 15, 1982, in the court of appeals, and the entire court of appeals, without dissent, properly rejected petitioner's urgings.

tendered by Trailways on the issue. Moreover, in *Lincoln* the ICC addressed the issue of systemwide harm within the confines of that proceeding, finding that "[t]he economic data presented by protestant are not sufficiently persuasive to enable us to determine that a grant would have a substantial material impact upon protestant's operations and its ability to serve the public." Pet. App. 43. Although Trailways disagreed with the ICC's conclusion in that case, the Fifth Circuit, in its *per curiam* opinion, found that "the board's opinion and findings disclose that it adequately considered and made findings on the systemwide issue, *as raised by Trailways in the hearing before the board.*" *Id.* (emphasis in original).

By contrast, in the present case, the court of appeals found that the review board, and later Division 1 of the Commission failed adequately to consider the issues of systemwide harm and long-term anticompetitive impact that likely would result from the proposed expansion of Greyhound's authority, even though those issues were properly raised before the Commission. Pet. App. 30. Indeed, the Commission rejected Trailways' supplemental evidence on this issue—contrary to its acceptance of that data in *Lincoln*—and erroneously held that it had no power to consider additional evidence of anticompetitive systemwide harm properly before it. Thus, the basis for the court of appeals' finding that the Commission acted in an arbitrary and capricious fashion in the case at bar simply was not present in *Lincoln.*

Similarly, there is no conflict between the opinion of the court of appeals here and the action of the Third Circuit in *Trailways (Atlantic City), supra* note 7, dismissing (without opinion) Trailways' petition for review of an ICC order which permitted Greyhound to offer new service to Atlantic City, New Jersey. Unlike the situation here, the Commission in *Atlantic City* subsequently did not refuse to accept evidence properly tendered to it on the issue of systemwide anticompetitive harm, and the agency thoroughly addressed this issue in its final decision. *Greyhound Lines, Inc., Extension—Special Operations, Atlantic City,* MC No. 1515 (Sub.-No. 222) (Aug. 26,

1980). In *Atlantic City*, as the Commission embarked upon an analysis of the factors relevant to Greyhound's application, it emphasized:

> [Greyhound's] size and resources alone mean that it has a much greater potential impact on the competitive structure of any given market than a small carrier could possibly have.... Here a large applicant such as Greyhound has resources in equipment, operating ability, and advertising exposure, for example, which are potentially sufficient to overwhelm competing carriers in the short term and thus endanger the long-term competitive balance in any given market. While these considerations would by no means justify an automatic denial of Greyhound's application, they do establish ample grounds for subjecting this application to closer scrutiny than those of smaller carriers. Therefore, it is appropriate that we analyze carefully the probable impact of applicant's proposed operations upon the competitive standing of all of the protesting carriers.

Slip op. at 17-18. Accordingly, the Commission analyzed the potential anticompetitive systemwide impact in its 47-page, *en banc* opinion in *Atlantic City*, and the dissenting opinions of Commissioners Stafford and Gilliam further ventilated that issue. That treatment stands in sharp relief to the cursory rejection of the issue here, in which the Commission panel simply concluded that "[Trailways'] representations concerning potential systemwide harm may not be considered." Pet. App. 32.

Thus, the crucial factors that persuaded the District of Columbia Circuit that the Commission had acted in an arbitrary and capricious fashion were missing in *Atlantic City*. Indeed, the Third Circuit simply affirmed the ICC's action without opinion.

Finally, petitioner argues generally that the decision of the District of Columbia Circuit is somehow contrary to the decisions of the United States Court of Appeals for the Seventh Circuit in *Assure Competitive Transportation, Inc. v. United*

States, supra note 9 (*"Assure II"*), and *Assure Competitive Transportation, Inc. v. United States* (*"Assure I"*), 629 F.2d 467 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981). In those cases, the Seventh Circuit denied petitions for review of the Commission's decision modifying the criteria for deciding route application cases. None of the issues facing the court in the case at bar was in any way implicated in the Seventh Circuit's decisions. Indeed, the District of Columbia Circuit, in its opinion in this case, recognized the validity of the modified criteria established by the Commission and approved by the Seventh Circuit, and specifically found that the Commission did not meet these standards with respect to Trailways. Pet. App. 18. In no way, therefore, does the decision of the court of appeals conflict with those of the Seventh Circuit in *Assure I* and *Assure II*.

In this case, the court of appeals found that Division 1 of the ICC failed adequately to address certain significant issues and evidence squarely and properly before it. Therefore, the Commission's precipitous decision on those issues was arbitrary and capricious. The court's decision was based entirely on the facts of this case, and the standards employed by the court in assessing those facts are not in conflict with the standards utilized by any other circuit.

II. THE REMAND OF THE COMMISSION'S DECISION BY THE DISTRICT OF COLUMBIA CIRCUIT WAS WITHIN ITS SCOPE OF REVIEW

A. The Court of Appeals Properly Found the Commission's Decision To Be Arbitrary and Capricious

The court of appeals correctly found that the ICC's decision was arbitrary and capricious because it failed to disclose that it had confronted all of the relevant issues.[12]

[12] The decisions of this Court clearly instruct that, under the arbitrary and capricious standard, *see* 5 U.S.C. § 706(2)(A)(E) (1976), a reviewing court is required to conduct a probing review of an administrative action to determine "whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment." *See* Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 284 (1974); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414-15 (1971).

Indeed, the Commission's failure to reach a reasoned decision in this case resulted directly from its own erroneous view of the scope of its authority to receive and consider evidence submitted to it. These errors necessarily undermined the integrity of the Commission's conclusion concerning an important relevant issue—the injury that a grant of Greyhound's application likely would cause to Greyhound's competitors.[13]

1. The agency's decision does not clearly reveal whether the Commission adequately considered the issue of potential systemwide harm

Petitioner apparently has abandoned its contention that the issue of potential systemwide harm was not a relevant factor in this case.[14] Neither does it continue to assert that the Commission "was in fact correct" in its finding that this important issue was not properly raised by Trailways.[15] Rather, petitioner now contends that Trailways did not present sufficient evidence on the issue of anticompetitive systemwide harm to meet its burden of proof in this case. Hence, it argues that the court of appeals' decision ignored Trailways' burden of proof and, in doing so, improperly intruded into an area of ICC policymaking discretion.

Petitioner offers a totally skewed reading of the court of appeals' decision. Although Trailways contended that it satisfied its burden of proof on the systemwide harm issue,[16] the court of appeals did not hold that Trailways had proved its case

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[13] The Commission's statutory co-respondent, the United States of America, refused to support the agency's orders before the court of appeals. The Government has not sought further review.

[14] *See* Brief for Intervenor-Respondent Greyhound Lines, Inc., dated July 8, 1981, at 18. The Commission, by contrast, conceded below that "the effect that a grant of authority would have on other carriers' overall operations" must be considered. *See* Brief for the Interstate Commerce Commission, dated August 5, 1981, at 23 n.11.

[15] *See* Brief for Intervenor-Respondent, *supra*, at 23.

[16] Not only did Trailways' witness testify as to how a grant of the application would cause systemwide harm to Trailways and increase Greyhound's dominance of the market, he also presented specific estimates of likely traffic diversions. J.A. 56-61.

(Pet. App. 22).[17] Rather, the court of appeals concluded only that the Commission's findings failed clearly to reveal "whether the Commission understood the nature of Trailways' arguments and considered them in balancing the interests involved." Pet. App. 10. Thus, the court narrowly held that Trailways' argument—that a grant to Greyhound (a "near-monopolist") would harm vulnerable competitors contrary to the public interest—did not get the "careful attention" from the ICC which it deserved. Pet. App. 18.

As the court of appeals found, "it is not at all clear that the Commission actually did look at systemwide harm to any degree." Pet. App. 11. In its only reference in the final decision to systemwide harm, the Commission held that it "may not be considered, for this issue was not raised prior to the time this proceeding reached the petition [for administrative review] stage." Pet. App. 32. The court of appeals accurately observed that this finding was clear error. Pet. App. 14.[18] The court noted further that other conclusory statements on this issue by both the Commission and its subordinate review board[19] avoided Trailways' essential argument that, notwithstanding the benefits of the proposed service, long-run competition in the industry would not be promoted by a grant of Greyhound's application. *Id.* While emphasizing that wherein the public interest ultimately lies was not the issue before the court, the District of Columbia Circuit concluded that the Commission's "incomplete analysis" of the public interest was arbitrary and capricious. Pet. App. 22-23.

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[17] The court observed, of course, that Trailways' efforts to build a record were frustrated by the agency's refusal to accept supplemental evidence and its erroneous holding that it lacked the power to take official notice of relevant comments filed in a related proceeding. Pet. App. 20.

[18] Trailways raised this issue in its initial evidentiary submission to the review board. *See* J.A. 60-61.

[19] The review board's finding on this issue—that it was "unable to conclude that the potential diversion of this traffic which a grant might precipitate would materially adversely affect either [Trailways Arkansas, Inc.] or its parent, Trailways" (Pet. App. 39-40)—was correctly found by the court of appeals to be "conclusory" and lacking in any articulated basis. Pet. App. 12. *Accord* C&H Transp. Co. v. ICC, 589 F.2d 565, 571-73 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

2. The agency erred in finding that it lacked the power to take notice of comments filed by Trailways in a pending ICC proceeding

The court of appeals also correctly found that the Commission's rejection of Trailways' evidence of anticompetitive systemwide harm—in the form of comments which it had recently filed in a related rulemaking proceeding pending before the Commission[20]—was plain error. Pet. App. 20-22. Although the Commission held that it "may not give consideration" to evidence contained in the records of other proceedings (Pet. App. 31), the court of appeals properly held that the decision of this Court in *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 528-30 (1946), as well as the Commission's own precedent,[21] recognize an agency's power to consider such evidence as long as all parties in the case at bar were also parties to the other proceeding. Because both Greyhound and Trailways were parties to the MC-133 proceeding from which record Trailways sought official notice, the court properly concluded that the Commission "was clearly wrong in concluding simply that it had no power to notice it." Pet. App. 22.

Hence, petitioner's arguments concerning the evidentiary value of the subject comments and its suggestion of possible grounds upon which the agency could have chosen not to consider the MC-133 evidence (Pet. App. 21-23), are wide of the mark. As the court of appeals found, the Commission's

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[20] The comments, filed in Ex Parte No. MC-133, *supra* note 4, contained "an exhaustive analysis of the interdependence of the various segments of the Trailways and NTBS route systems . . . [and] addressed the structure of the intercity bus industry and Greyhound's competitive advantages . . . which intensifies its capacity to accomplish substantial traffic diversions from its weaker competitors such as Trailways." Pet. App. 20. As the lower court noted (Pet. App. 19), that rulemaking proceeding has been "suspended" by the Commission in anticipation that Congress is about to enact comprehensive legislation that would substantially alter entry standards for the motorbus industry. *See* Bus Regulatory Reform Act of 1982, H.R. 3663, 97th Cong., 2d Sess., 128 Cong. Rec. S7699-7708 (daily ed. June 30, 1982).

[21] *See, e.g.*, Airfield Serv. Co., Ext.—Bradley Int'l Airport, 121 M.C.C. 765, 778 (1975).

decision in this case was *not* an exercise of its discretion one way or another:

> [I]t was bottomed squarely upon a statement and apparent belief that the ICC *could not* lawfully notice the record in the other proceeding. In this it was clearly wrong.

Pet. App. 21 (emphasis in original). Thus, the court properly found, under the arbitrary and capricious standard, that the Commission had committed a clear error of judgment and it remanded the case so that the agency could exercise its "discretionary prerogative." Pet. App. 22.

B. The Court of Appeals Did Not Intrude into Areas Committed to Agency Discretion

Contrary to petitioner's claims (Pet. 13-20), the court of appeals did not invade the ICC's policy domain, ignore Trailways' burden of proof, or improperly interfere with the Commission's procedural discretion.[22] Indeed, it is instructive to note that the Commission, whose policy standards and procedures are alleged by petitioner to have been undermined, has not sought further review of the court of appeals' decision.

1. The decision of the court of appeals is consistent with the ICC's current licensing policies

The court of appeals approvingly acknowledged the criteria which traditionally have governed ICC determinations as to public convenience and necessity[23] and noted that the

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[22] There is no merit to petitioner's claim that the court of appeals' decision conflicts with the admonitions of this Court against "judicial intrusion" into areas of an agency's procedural discretion. Petitioner's reliance in this regard on FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981), and Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519 (1978), is misplaced. The court of appeals remanded the ICC's decision not because the agency failed to follow the court's notion of the proper procedures, but rather because the Commission's findings did not reveal that it properly considered all of the relevant factors. Indeed, unlike *Listeners Guild* and *Vermont Yankee*, the court's remand in this case was based on substantive, not procedural, errors by the agency.

[23] The decision below not only recognized the Commission's long-established guidelines in Pan-American Bus Lines Operation, 1 M.C.C. 190, 203 (1936), but also noted that the Commission is entitled to broad discretion in balancing the competing interests involved. Pet. App. 7-8.

Commission recently, in its MC-121 proceeding,[24] "has adopted a policy that competition is to be given more weight" in the evaluation of applications for new route authority (Pet. App. 15). The court had no quarrel with these recent, judicially approved policy changes by the ICC. *Id.* n.48. Rather, the court held that Trailways presented sufficient evidence, even under the more exacting burden imposed on protestants by the MC-121 policies, to require the ICC adequately to explain how it balanced *all* of the competing factors.[25] Pet. App. 13-14. Where the Commission grants an application for new route authority without adequately explaining why protestants' allegations of harm are insufficient, it is the duty of a reviewing court to order a remand so that the agency properly may consider the issue. *See Argo-Collier Truck Lines Corp. v. United States*, 611 F.2d 149, 155 (6th Cir. 1979); *Campbell Sixty-Six Express, Inc. v. ICC*, 603 F.2d 1012, 1014 (D.C. Cir. 1979).[26]

There is also no merit to the argument (Pet. 17-20) that the court of appeals engaged in "judicial legislation" by holding that the ICC is required to evaluate the issue of harm in the context of "a market structure of which [it] should be expertly aware and which Trailways should therefore not be bound to 'prove' before using it as a basis for its argument." Pet. App. 16. The decision of the court of appeals simply recognized that the

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[24] Ex Parte No. MC-121, *Policy Statement on Motor Carrier Regulation* (Pet. App. 59).

[25] The court observed that the assumption underlying the MC-121 proceeding's increase in a protestant's burden is that an application for expanded route authority is procompetitive "in the great majority of cases, but not necessarily in all." Pet. App. 15. Thus, the court cautioned that the ICC should not become "so enamored of procedural rules regarding burden of proof" that it strays from its statutory goals, including its duty to encourage sound economic conditions among carriers and to prevent destructive competitive practices. *Id. See* 49 U.S.C. § 10101(a) (Supp. IV 1980).

[26] In a case where the applicant dominates its market and may be able to inflict harm on its competitors, the court properly noted that the Commission should undertake a "careful and detailed examination of *all* aspects of public interest, including the long-range interest in continuing competition in the market." Pet. App. 19 (emphasis in original). Indeed, the Commission's MC-121 Policy Statement states that "more emphasis would be given to the benefits of healthy competition." Pet. App. 59.

intercity bus industry is uniquely dominated by Greyhound—a fact which the Commission itself has acknowledged.[27] Thus, the court correctly observed that because Greyhound has "a real ability to inflict harm on its competitors," Trailways' claims of adverse consequences deserve "especially careful attention" by the Commission. Pet. App. 17-18.[28] In short, the court of appeals merely pointed to the ICC's traditional duty adequately to consider the issue of adverse impact in the context of a licensing case involving an applicant which already dominates its market.[29]

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[27] *See* California Parlor Car Tours Co.—Purchase—The Greyhound Corp., 127 M.C.C. 343, 352 (1978), *modified*, 127 M.C.C. 605 (1979). As one commentator recently has noted:

> The intercity bus industry, however, differs in one major respect from trucking and airlines. It is dominated by one carrier, Greyhound Lines, Inc. . . . .

Cutler, *Antitrust and Deregulation: The Usefulness of Section Two of the Sherman Act in Restraining Anticompetitive Behavior in the Intercity Bus Industry*, 49 ICC Prac. J. 33, 33 (1981).

[28] This Court previously has recognized Greyhound's capacity to engage in predatory practices against its competitors. *See* Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 337 (1978); *see also* Mt. Hood Stages, Inc. v. Greyhound Corp., 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980); United States v. Southwestern Greyhound Lines, Inc., 1953 Trade Cas. (CCH) ¶ 67,470 (N.D. Okla.); United States v. Greyhound Corp., No. 57-01107 (N.D. Ill. June 27, 1957).

[29] The failure of the Commission's decision to reflect that adequate consideration was given in this adjudicatory proceeding to the full impact of a grant to Greyhound is not excused by the ICC's subsequent legislative statement that it does not favor the adoption *by Congress* of a "two-tier approach" whereby Greyhound's ability to gain new authority would be statutorily curtailed so that other carriers could gain larger market shares. *See* Pet. App. 90-92. Contrary to petitioner's claim (Pet. 15), this statement was issued nearly six months after the Commission's final decision and the filing of the petition for judicial review and, in any event, cannot relieve the agency of its legal obligation adequately to consider the *full* competitive consequences of a grant to the market-dominant Greyhound where that issue is appropriately raised in an adjudicatory proceeding.

2. The court's remand instructions preserve the agency's discretion to ascertain the validity of Trailways' arguments

Petitioner's arguments as to the allegedly "intrusive" nature of the court of appeals' remand instructions are unpersuasive. The court of appeals was careful not to intimate any view as to the merits of Trailways' arguments regarding the potential harm precipitated by a grant of authority to Greyhound. The court merely instructed the ICC to assess "the structure of the bus market and determin[e] if there is any detriment to public interest arising from the incremental impact on Trailways' competitive position of granting Greyhound an authority which, in all other respects, seems quite reasonable." Pet. App. 18. The court also instructed the ICC to use its discretionary prerogative to determine if it should take official notice of the comments offered by Trailways. Neither of these instructions can possibly be characterized as intrusive or complex.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

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